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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

KURT F. FROEBEL,

Petitioner,

v.

GEORGE E. MEYER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the Seventh Circuit held that Petitioner's Clean Water Act claim for injunctive relief under 33 U.S.C. § 1365 could have been asserted in a prior state administrative hearing proceeding or the administrative appeal from that proceeding in state court, even though the Administrative Law Judge and the Wisconsin Court of Appeals found that they had no jurisdiction or statutory authority to grant him relief. The Seventh Circuit then held that Petitioner's claim was barred by the doctrine of "claim preclusion." It also held that the owner of the property on which an alleged point source of pollutants is located could not be held responsible for the ongoing discharges of pollutants from the point source.

The questions presented for review are:

1. Does a state administrative law judge or state court conducting administrative judicial review proceedings, whose jurisdiction is defined by state statutes, have concurrent jurisdiction to entertain a claim for injunctive relief under 33 U.S.C. § 1365?

2. Was the doctrine of "claim preclusion" properly applied in this case when, at the time Petitioner was pursuing his state administrative remedies, no split in authority between the Circuits existed, and the legal precedents held that jurisdiction of "citizen suits" under federal environmental laws was vested exclusively in the federal courts?

3. Can a person who merely acquires ownership and control of a point source of ongoing pollutant discharges be held responsible for the ongoing pollutant discharges under the Clean Water Act?

STATEMENT NAMING ADDITIONAL PARTIES

The parties to the proceedings below who are not reflected in the caption include William Sturtevant, a dam safety engineer employed by the Wisconsin Department of Natural Resources, and Waukesha County, a political subdivision of the State of Wisconsin. The Wisconsin Department of Natural Resources was originally a party-defendant in the District Court, but it was dismissed by stipulation and did not participate in the proceedings before the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Kurt F. Froebel (hereinafter "Froebel"), a private individual, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on June 28, 2000, and with respect to which an order denying a petition for rehearing and suggestion for rehearing *en banc* was entered on July 28, 2000.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported at *Froebel v. Meyer*, 217 F.3d 928 (7th Cir. 2000), and appears in the Appendix at 1a-21a. The decision and order of the United States District Court for the Eastern District of Wisconsin is reported at *Froebel v. Meyer*, 13 F. Supp.2d 843 (E.D. Wis. 1998), and appears in the Appendix at 23a-88a. The decision of the district court on Froebel's motion for reconsideration is not reported, but it appears in the Appendix at 89a-96a. The decision of the Wisconsin Court of Appeals is reported at *Froebel v. Wisconsin Department of Natural Resources*, 579 N.W.2d 774 (Wis. App. 1998)[1], and appears in the Appendix at 97a-117a. The decision and order of the state administrative law judge, Jeffrey D. Boldt, is unpublished, but is

[1] A somewhat related case regarding whether it was necessary for DNR to conduct a hearing concerning the need to prepare an Environmental Impact Statement is reported at *North Lake Management District v. Wisconsin Department of Natural Resources*, 513 N.W.2d 703 (Wis. App. 1994).

available on Westlaw at *In re Removal of Funks Dam*, Case No. 3-SE-92-322, 1996 WL 263059 (Wis. Div. Hrg. App. Feb. 21, 1996), and appears in the Appendix at 118a-140a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals entered its final judgment in this matter on the same day that it issued its decision, June 28, 2000. *See* App. 22a. Its order denying Froebel's Petition for Rehearing and Suggestion for Rehearing En Banc was entered on July 28, 2000. App. 141a. This petition is filed within ninety (90) days of that order pursuant to 28 U.S.C. § 2101(c), and this Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Clean Water Act, 33 U.S.C. § 1331(a)

> (a) Except as in compliance with this section and sections 302, 306, 307, 318, 402 and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

Clean Water Act, 33 U.S.C. § 1365(a) and (b)

> (a) Except as provided in subsection (b) of this section, and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf –

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) No action may be commenced –

(1) under subsection (a)(1) of this section –

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any

such action in a court of the United States any citizen may intervene as a matter of right.

Wisconsin Statutes, § 31.187(1)

(1) The department may remove or cause to be removed, in such manner as it deems fit, old and abandoned dams in streams in this state, upon giving 60 days' notice in writing to the owner thereof, if the owner can be found. If the owner of the dam is unknown or cannot, by due diligence, be found, the department shall publish a class 3 notice, under ch. 985, in the county in which the dam is situated.

STATEMENT OF THE CASE

Funks Dam is located on the Oconomowoc River, approximately one mile upstream from North Lake, in Waukesha County, Wisconsin. It was built in approximately 1850. Behind Funks Dam is the Dam Impoundment, or flowage, containing all of the silt and sediment that accumulated behind the dam over the course of 150 years.

In 1992, the Wisconsin Department of Natural Resources ("DNR") decided to remove the dam. However, the DNR did not remove Funks Dam. Acting under the auspices of George Meyer ("Meyer"), the Secretary of DNR, and William Sturtevant ("Sturtevant"), a dam safety engineer employed by DNR, Funks Dam was merely breached.

With each ensuing large storm event, incredible amounts of accumulated silt and sediment in the Dam

Impoundment were scoured from the bottom of the Dam Impoundment and discharged through the breach in Funks Dam to the Oconomowoc River and North Lake. The result was the formation of large silt and muck bars in the riverbed and a delta at the mouth of the river in North Lake. The flora and fauna that previously inhabited the river environment were buried, *in situ*, literally killing the river habitat below the dam. Additional silt "pulses" have continued to emanate from the Dam Impoundment, through the breach in Funks Dam, with each major storm event. Waukesha County currently owns and controls the property on which Funks Dam is located.

Seeking redress for the ongoing damage to the river and lake he had used for hunting and fishing for decades, Froebel initially intervened in a state administrative hearing proceeding. The State Administrative Law Judge ("ALJ"), however, concluded that his jurisdiction and authority were limited and that he had no power to grant Froebel any relief.

> This case has a unique and extensive procedural posture that raises serious issues as to the jurisdiction and authority of the ALJ. This case was not noticed as an enforcement action or as a hearing on the reasonableness or necessity for any remedial actions by the Department or its contractor. There is no specific statutory authority for the ALJ to Order remedial actions by the Department or its contractor in light of the Division's conclusion that the failure to follow the drawdown and removal plan contributed to the release of sediment into the waters of the state. Under these circumstances, the ALJ believes the best course is to remand the case back to the

> Department to take such actions as the DNR sees fit under the circumstances.

In re Removal of Funks Dam, 1996 WL 263059, App. 130a-31a.

Froebel then pursued an administrative appeal of the State ALJ's decision pursuant to the Wisconsin Administrative Procedure Act, Chapter 227, Wis. Stats., and during the pendency of those proceedings, on May 8, 1996, he also served his Notice of Intent to file a Clean Water Act "citizens suit" in federal district court pursuant to 33 U.S.C. § 1365. App. 142a-49a.

Froebel commenced his Clean Water Act citizen suit on June 6, 1997, while the state court litigation was then pending before the Wisconsin Court of Appeals. On March 4, 1998, the Wisconsin Court of Appeals issued its decision, concluding that it too was bound by the unique terms of § 31.187 of the Wisconsin Statutes, *quoted ante* at 4, and was powerless to grant Froebel any relief with respect to the ongoing harm to the Oconomowoc River and North Lake:

> The ALJ's and the circuit court's authority is limited by statute. *See Jocz*, 196 Wis.2d at 291, 538 N.W.2d at 593.[2] The statutes pertaining to the regulation of dams and bridges affecting navigable waters are premised upon the powers of the DNR to oversee their construction and maintenance. *See* § 31.02, Stats. However, the statutes do not provide for the regulation of the DNR itself in this role, nor do they provide a manner in which the DNR may be enjoined to take specific

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[2] *Jocz v. L.I.R.C.*, 538 N.W.2d 588 (Wis. App. 1995).

> remedial action. The ALJ, the circuit court, and now this court cannot lawfully grant Froebel's request for relief because we are bound by the statutes.
>
> We join in the ALJ's criticisms of the DNR's practices in this case. We would expect the DNR, as the protector of this state's natural resources and the chief enforcer of our laws protecting those assets, to abide by the rules which it imposes and enforces on others. We also would expect it to abide by the promises and representations it makes to the public regarding its own activities. These expectations may perhaps explain why the legislature has not deemed it necessary to create laws which make the DNR subject to the requirements imposed on others. However, we cannot rewrite the existing laws to accommodate Froebel's legitimate complaints. His arguments and his criticisms are more properly directed to the legislature.

Froebel, 579 N.W.2d at 783.

On July 30, 1998, the district court issued a lengthy decision granting the defendants' motions to dismiss the complaint under Fed.R.Civ.P. 12(b)(1) and 12(b)(6), because the sediment being scoured from the Dam Impoundment and discharged through the breach in Funks Dam did not constitute the discharge of a "pollutant" subject to regulation under Section 402 of the Clean Water Act, 33 U.S.C. § 1342, and because the silt and muck bars forming in the riverbed and at the mouth of the Oconomowoc River in North Lake did not constitute "dredged or fill material" subject to regulation under Section 404 of the Clean Water Act, 33 U.S.C. § 1344. *Froebel v. Meyer*, 13 F. Supp.2d 843 (E.D. Wis. 1998). The district court subsequently denied

Froebel's motion for reconsideration on October 23, 1998. App. 89a-96a.

Because he believed the district court's decision was contrary to the decisions in *Du Bois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996); *Committee To Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir. 1993); *Rybachek v. United States Environmental Protection Agency*, 904 F.2d 1276 (9th Cir. 1990); *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983),[3] Froebel pursued his appeal to the United States Court of Appeals for the Seventh Circuit.

As to Meyer and Sturtevant, the Seventh Circuit held, purporting to apply Wisconsin claim preclusion law, that Froebel could have, should have, but failed to assert his claim under 33 U.S.C. § 1365 in the proceedings before the State ALJ or the administrative appeal proceedings before the Wisconsin courts and, accordingly, his claim under 33 U.S.C. § 1365 was legally barred by judicial doctrine of "claim preclusion." *Froebel*, 217 F.3d at 935-36 (7th Cir. 2000).[4]

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[3] The district court's decision also appears to be inconsistent with two more recent decisions in *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000) and *Driscoll v. Adams*, 181 F.3d 1285 (11th Cir. 1999).

[4] Nineteen days later, on July 17, 2000, while Froebel's petition for rehearing was still pending before the court, the same Judge, writing for a different panel of the Seventh Circuit, issued a decision purporting to apply the same Wisconsin rules of claim preclusion in a case arising under the Americans with Disabilities Act, 42 U.S.C. § 1201, et seq., reaching precisely the

As to Waukesha County, the Seventh Circuit held that, since the County was not engaged in any active conduct, it could not be held responsible for the pulses of silt being discharged through the breach in Funks Dam. *Id.* at 939.[5] Froebel's petition for rehearing was subsequently denied on July 28, 2000. App. 141a.

ARGUMENTS IN FAVOR OF GRANTING THE WRIT

This case presents some extremely important issues that deserve the immediate attention of the Court. There is a split of authority in the Circuit Courts of Appeal as to whether federal jurisdiction of "citizen suits" is exclusive or shared concurrently with state courts. In this case, the Seventh Circuit held that claims under the Clean Water Act, 33 U.S.C. § 1365, may be brought in state courts and may even be asserted in state administrative hearing proceedings before state Administrative Law Judges ("State ALJs"). Because, according to the Seventh Circuit, Froebel apparently could have but failed to bring his Clean Water Act citizen suit claim in a state administrative proceeding

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opposite result. *Staats v. County of Sawyer*, 220 F.3d 511 (7th Cir. 2000). There is no basis for reconciling the two decisions applying the same law but reaching the opposite result.

[5] Contrary to the Seventh Circuit's decision, Froebel never conceded that Waukesha County was not subject to Sections 402 or 404 of the Clean Water Act, 33 U.S.C. §§ 1342, 1344. What was conceded was that Waukesha County had nothing to do with breaching Funks Dam, that it was not engaged in any active conduct, and that it was doing nothing to eliminate the ongoing sediment discharges.

or the administrative appeal from the final decision rendered in that proceeding, the Seventh Circuit held that the citizen suit he brought in federal court was legally barred by the judicial doctrine of "claim preclusion."

If the intent of Congress to enlist the aid of citizen suit plaintiffs to enforce the uniform, minimum standards of federal environmental laws is to be fulfilled,[6] it is extremely important for citizen suit plaintiffs to know when, where and how to invoke the rights given to them by Congress. At present, they are left to guess, or they are compelled to forego pursuit of state administrative remedies in order to preserve their federal rights.[7] It is equally important for State ALJs and state courts to know that they actually have broader powers and jurisdiction to enforce federal statutes and regulations, conferred upon them by Congress, rather than being constrained by the state statutes and regulations which would otherwise define the limits of their jurisdiction and authority.

Additionally, since the same statute creating the same claim that the Seventh Circuit held could have been brought in the state administrative hearing proceeding or state court in this case, also authorizes citizen suits against the Administrator of U.S. EPA to compel her to perform

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[6] *See Natural Resources Defense Council v. California Dep't of Transp.*, 96 F.3d 420, 424 (9th Cir. 1996), *quoting*, S. Rep. No. 414, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3746.

[7] Such a result is completely contrary to the plain terms of 33 U.S.C. § 1365(e), which preserves "any right which any person (or class of persons) may have under any statute or common law. . . . "

her mandatory duties, the Seventh Circuit's decision, if followed, would indicate that Congress intended to confer upon every state court of general jurisdiction and every State ALJ the authority to entertain and adjudicate claims against the Administrator of U.S. EPA. It is doubtful that Congress intended such a result.

I. There Is a Split of Authority in the Circuits Regarding the Exclusivity of Federal Jurisdiction of Environmental Citizen Suits.

The Clean Water Act ("CWA"), the Resource Conservation and Recovery Act ("RCRA"), and the Clean Air Act ("CAA") all have substantially similar "citizen suit" provisions. 33 U.S.C. § 1365; 42 U.S.C. § 6972; 42 U.S.C. § 7604.[8] Each of these statutes contain similar language to 33 U.S.C. § 1365:

> (a) Except as provided in subsection (b) of this section, and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf –
>
> > (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in

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[8] Other examples of "citizen suit" statutes can be found in the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11046, the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), the Noise Control Act of 1972 ("NCA"), 42 U.S.C. § 4911, and the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. § 1270.

> violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation. . . .
>
> * * *
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

33 U.S.C. § 1365(a) and (b) (emphasis added).

As required by this Court's decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), Froebel served his Notice of Intent to pursue a claim for injunctive relief under 33 U.S.C. § 1365 on May 8, 1996, after the decision of the State ALJ was issued on February 21, 1996, but more than seven months before the final judgment was entered in the state court judicial review proceedings on December 27, 1996, and almost two years before the Wisconsin Court of Appeals issued its decision in the case on March 4, 1998. *Froebel v. Wisconsin Department of Natural Resources*, 579 N.W.2d 744 (Wis. App. 1998). The Complaint was filed in federal district court on June 6, 1997, while the appeal was still pending before the Wisconsin Court of Appeals. At no time after the Notice of Intent was served, and before the complaint was filed in federal district court, did anyone ever argue or suggest

that Froebel could have or should have brought his 33 U.S.C. § 1365 claim in the state courts.[9]

The reason none of the parties to the state court proceedings suggested that Froebel bring his § 1365 claim in state court was the fact that, at the time, all of the relevant federal authorities uniformly held, either directly or inferentially, that federal jurisdiction of claims under the virtually identical language of the RCRA citizen suit statute, 42 U.S.C. § 6972, was exclusively federal:

> Here, plaintiff could not have raised its RCRA claim in the Superior Court of New Jersey. 42 U.S.C. § 6972(a)(1)(B)(2) provides in relevant part:
>
> > "Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur."
>
> This provision constitutes a grant of exclusive jurisdiction over citizens' suits pursuant to RCRA to the United States Courts.

Middlesex County Bd. of Freeholders v. State of N.J. Dept. of Env. Protection, 645 F. Supp. 715, 719 (D.N.J. 1986).

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[9] *See England v. Louisiana State Bd. of Med. Exam'r*, 375 U.S. 411 (1964) (holding that plaintiff could reserve his right to return to federal court under 42 U.S.C. § 1983 after exhausting his rights in state administrative proceedings); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1072-73 (3d Cir. 1990) (holding that the subsequent federal claim was not precluded because the opposing party in the state claim had notice of the plaintiff's reservation of a federal right and did not object).

The reasoning of the court in *Middlesex County* was followed by the United States Court of Appeals for the Eighth Circuit in *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1098 (8th Cir. 1989): "The RCRA places exclusive jurisdiction in federal courts for suits brought pursuant to section 6972(a)(1) of the Resource Conservation and Recovery Act." *See also Reservation Tel. Co-op. v. Three Affiliated Tribes*, 76 F.3d 181, 185 (8th Cir. 1996), distinguishing *Blue Legs* based on the exclusivity of federal jurisdiction under RCRA; *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997), similarly distinguishing *Blue Legs* based on the exclusivity of federal jurisdiction under RCRA; and *Fletcher v. United States*, 116 F.3d 1315, 1327 (10th Cir. 1997), similarly distinguishing *Blue Legs* based on the exclusivity of federal jurisdiction under RCRA.

In refusing to abstain in a RCRA citizen suit, yet another court had held: "It is because the RCRA Citizen Suit is exclusively a federal cause of action that the Court finds Burford abstention to be inappropriate in the case at bar." *White & Brewer Trucking, Inc. v. Donley*, 952 F. Supp. 1306, 1312 (C.D. Ill. 1997).

Froebel submits it was reasonable for him to rely on the foregoing federal authorities to conclude that jurisdiction of his Clean Water Act claim under 33 U.S.C. § 1365 was exclusively vested in the federal courts, and that he could pursue his Clean Water Act claim in federal court after having exhausted whatever remedies were available to him under state law in the state administrative proceedings. In fact, to the best of Froebel's knowledge, after exhaustive research, the decision of the Seventh Circuit in this case is the first case in the nation to hold or even

suggest that a State ALJ or a state court conducting administrative judicial review proceedings, or any state court for that matter, has jurisdiction to entertain a claim under 33 U.S.C. § 1365.

It was not until June, 1998, a year after Froebel commenced his action in the federal district court, that a split in authority in the Circuit Courts of Appeal developed regarding the exclusivity of federal court jurisdiction of citizen suits under the comparable language of the RCRA citizen statute, 42 U.S.C. § 6972. A divided panel of the Sixth Circuit Court of Appeals issued its decision in *Davis v. Sun Oil Co.*, 148 F.3d 606, 611-12 (6th Cir. 1998), rejecting the Eighth Circuit's decision in *Blue Legs* and other prior precedents, and holding that state courts of general jurisdiction had concurrent jurisdiction to entertain claims under 42 U.S.C. § 6972.[10]

There is still no decision, other than the Seventh Circuit's in this case, that stands for the proposition that state courts of general jurisdiction, much less State ALJs or state courts conducting administrative judicial review proceedings in an appellate capacity, have jurisdiction to entertain claims under 33 U.S.C. § 1365. Nevertheless, it is very important to address the divergence of authority concerning the exclusive/concurrent jurisdiction dichotomy now.

If the problem is not addressed and resolved, citizen suit plaintiffs in the position of Froebel are left to guess where, when and how they are supposed to exercise their

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[10] Significantly, the Sixth Circuit did not address whether the statutory scheme of RCRA would plainly be disrupted by the exercise of concurrent state court jurisdiction because the appellants never made the argument. *Id.* at 612 n.5.

rights under 33 U.S.C. § 1365, or the RCRA citizen suit statute, 42 U.S.C. § 6972, or other, comparable citizen suit statutes. As Judge Boggs wrote in *Davis*, concurring in part and dissenting in part:

> The difficulty for the Davises was compounded by the fact that no court, so far as I can tell, had ever held that RCRA cases could be brought in state court, and that numerous courts had either held or assumed that jurisdiction was exclusively federal. Nor do we find any report of a RCRA citizens action ever being brought in an Ohio court.

Id. at 614-15.[11]

Applying the reasoning of the Seventh Circuit, and assuming that State ALJs and agencies continue to follow the black letter rule of Wisconsin law that they have only such powers as are expressly conferred on them by state statutes,[12] citizen suit plaintiffs will likely be forced to choose between exercising their rights under state law or federal law.

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[11] It was fortunate for the Davises, unlike Froebel in this case, that the Ohio state court was competent to grant them virtually all the relief they were seeking in federal court, with the exception of the assessment of penalties, including: (a) an injunction to clean up the property, with a surety bond to secure performance; (b) money damages equal to the costs the Davises had already incurred; and (c) punitive damages for the fraud perpetrated by Sun Oil Company. *Id.* at 608.

[12] *See, e.g., Wisconsin Patients Compensation Fund v. Wisconsin Health Care*, 547 N.W.2d 578, 582 (Wis. 1996); *accord State Public Intervenor v. Department of Natural Resources*, 503 N.W.2d 305 (Wis. App. 1993), and *Kimberly-Clark Corp. v. Neenah*, 329 N.W.2d 143 (Wis. 1983).

Most administrative appeal and hearing rights expire after thirty or sixty days days, *see* § 227.53, Wis. Stats.,[13] most likely long before the expiration of the mandatory sixty (60) day notice period under 33 U.S.C. § 1365. *See Gwaltney*, 484 U.S. 49. It is also well established that judicial review under the Wisconsin Administrative Procedure Act, Chapter 227, Wis. Stats., is the *exclusive* remedy for Wisconsin citizens seeking relief from final, state agency decisions. *State ex rel. Frederick v. Cox*, 330 N.W.2d 603 (Wis. App. 1982) (affirming dismissal of attempted *quo warranto* action). Since judicial review proceeding must be initiated within thirty days, § 227.53, Wis. Stats., and since 33 U.S.C. § 1365 requires a 60-day notice it was impossible for Froebel to bring the administrative judicial review proceedings as a pendant state claim in federal court.

Forcing citizens to give up their rights under state law, or risk losing their rights under federal law due to claim preclusion, is plainly contrary to the terms of 33 U.S.C. § 1365(e):

> (e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek

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[13] *See Sewerage Commission v. Department of Natural Resources*, 307 N.W.2d 189, 193-95 (Wis. 1981) (declaratory judgment action was properly dismissed where Commission failed to pursue administrative remedies in a timely fashion); *Cudahy v. Department of Revenue*, 224 N.W.2d 570 (Wis. 1974) (failure to timely file and serve petition for judicial review within thirty days of agency decision deprives a reviewing court of subject matter jurisdiction).

> enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

And, as Justice Scalia wrote in *Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994):

> The federal rules on the subject of issue and claim preclusion, unlike those relating to exhaustion of state remedies, are "almost entirely judge-made." [citations omitted] And in developing them the courts can, and indeed should, be guided by the federal policies reflected in congressional enactments.

Given the clear terms of § 1365(e), it certainly isn't federal policy to induce potential citizen suit plaintiffs to forfeit their state law rights in order to avoid the application of claim preclusion. Froebel's pursuit of his exclusive remedies under state law is entirely consistent with and appropriate under § 1365(e).

The Seventh Circuit's application of claim preclusion in this case is not consistent with the statute or the holding of this Court that:

> We therefore reject a judicially created exception to § 1738 that effectively holds as a matter of federal law that a plaintiff can bring state law claims initially in state court only at the cost of foregoing subsequent federal antitrust claims.

Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373, 386 (1985). Given the explicit findings of the State ALJ and the Wisconsin Court of Appeals, regarding the strict limitations on their jurisdiction and authority, the Seventh Circuit has done precisely what this Court refused to do.

With the divergence of authority in the Circuit Courts, there are also substantial policy and statutory interpretation questions that are raised by the Seventh Circuit's decision, which should be addressed promptly by the Court. If Congress intended State ALJs and state courts to have concurrent jurisdiction of claims for injunctive relief under 33 U.S.C. § 1365(a)(1), it must have similarly intended to confer concurrent jurisdiction on State ALJs and state courts to entertain claims against the Administrator of U.S. EPA under § 1365(a)(2). Subjecting the Administrator to the jurisdiction of a wide variety of state administrative tribunals, with widely divergent procedural rules, as well as every state court of general jurisdiction in over fifty states and territories is a serious matter.[14]

The prospect of the removal to federal court of large numbers of state administrative proceedings and permitting decisions, based on federal question jurisdiction and putative claims under 33 U.S.C. § 1365 or other citizen suit statutes, should also be a substantial cause for concern. *See City of Chicago v. Intern. College of Surgeons*, 522 U.S. 156 (1997). Given the plain language of § 1365 that "the district courts shall have jurisdiction" of such claims, it is difficult to argue against federal removal jurisdiction when there is an issue regarding federal effluent limitations or an allegedly unperformed mandatory duty on the part of the Administrator.

This is not a situation in which a federal cause of action is created for awarding individual money damages

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[14] This same problem also arises with respect to the Sixth Circuit's construction of RCRA, 42 U.S.C. § 6972, in *Davis v. Sun Oil Co.*, 148 F.3d 606, 611-12 (8th Cir. 1998).

in an action comparable to a common law tort. *See Gulf Offshore Co. v. Mobil Oil Corp*, 453 U.S. 473, 483-84 (1981). Congress clearly intended the Clean Water Act and other environmental protection statutes to establish uniform, baseline federal standards, and there is a substantial federal interest in the uniform enforcement of those minimum federal standards. *See Natural Resources Defense Council v. California Dep't of Transp.*, 96 F.3d 420, 424 (9th Cir. 1996), *quoting* S. Rep. No. 414, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3746. The fact of the matter is that federal judges, who do not face the political pressures of being elected after forcing a local industry to comply with a federal effluent limitation, are in a better position to enforce those minimum federal standards on a uniform basis. As shown by what transpired in this case, and the truly unique terms of § 31.187, Wis. Stats., it is problematic to ask State ALJs and state courts to disregard state laws and regulations in favor of enforcing federal laws and standards.

All of these are relevant concerns in determining whether jurisdiction under 33 U.S.C. § 1365 should be exclusively federal or concurrent with State ALJs and state courts. Froebel further submits that, even in the absence of the plain language of § 1365(e), citizen suit plaintiffs should be encouraged to pursue administrative remedies under state law, rather than be discouraged or foreclosed from pursuing state law remedies due to specter of claim preclusion.

II. The Court of Appeals' Decision is Contrary to Prior Decisions of This Court and Its Own Decisions.

There were several problems that the State ALJ and the Wisconsin Court of Appeals had to wrestle with in this case. First, the State ALJ found that he had very limited jurisdiction. Although he could evaluate the reasonableness of the initial decision to remove Funks Dam, he found that he had no jurisdiction to consider the *manner* in which it was "removed" or the *consequences* of the manner in which it was "removed." The Wisconsin Court of Appeals had no more jurisdiction than the State ALJ, and it was further forced to follow the state statutes and conclude that the unique terms of § 31.187, Wis. Stats., allowing DNR to remove dams "in such manner as it deems fit," essentially trumped all of the other statutory standards and prohibitions that might have otherwise been applicable. As the district court noted, Meyer and Surtevant did not enjoy any such special exemption from the federal standards and effluent limitations in the Clean Water Act.

When different legal standards are applicable to different proceedings, this Court has refused to apply claim preclusion in the subsequent proceeding. A case in point is *Cooper v. Federal Reserve Bank of Colorado*, 467 U.S. 867 (1984). In that case, the Court considered the preclusive effect of a judgment rendered in a class action, where the test was whether there was an established general pattern or practice of racial discrimination within the class, upon subsequent individual claims brought by members of the class, in which the test was whether the employer had

intentionally discriminated against the individual in making the individual employment decision. This Court concluded that claim preclusion was inappropriate.

> That judgment (1) bars the class members from bringing another class action against the Bank alleging a pattern or practice of discrimination for the relevant time period and (2) precludes the class members in any other litigation with the Bank from relitigating the question whether the Bank engaged in a pattern and practice of discrimination against black employees during the relevant time period. The judgment is not, however, dispositive of the individual claims the Baxter petitioners have alleged in their separate action.

Id. at 880. The same test should apply here. The fact that Meyer and Sturtevant may have had authority under § 31.187, Wis. Stats., to "remove" Funks Dam in any manner they deemed fit, does not mean that the manner they deemed fit to remove Funks Dam, or the state that they left it in, did not violate the statutory prohibition of the Clean Water Act in 33 U.S.C. § 1331(a):

> (a) Except as in compliance with this section and sections 302, 306, 307, 318, 402 and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

As even the Seventh Circuit noted, the Wisconsin Legislature cannot authorize or sanction a violation of federal law. *Froebel*, 217 F.3d at 937. The Seventh Circuit's statement that the State ALJ or the state courts would have refused to follow state law, "if Froebel had given them the chance," *id.*, is sheer speculation and contrary to the clear

language in the decisions of the State ALJ and the Wisconsin Court of Appeals, concluding that they were compelled to follow state law despite their dissatisfaction with the consequences. *In re Removal of Funks Dam*, 1996 WL 263059, App. 64a-65a; *Froebel*, 579 N.W.2d at 783; *quoted ante* at 5-7.

The Seventh Circuit's decision in this case is also inconsistent with the rule enunciated by Justice O'Conner in *Marrese*, 470 U.S. at 383:

> To the extent that state preclusion law indicates that a judgment normally does not have claim preclusive effect as to matters that the court lacked jurisdiction to entertain, lower courts and commentators have correctly concluded that a state court judgment does not bar a subsequent federal antitrust claim.

Jurisdictional competency is, in fact, one of the essential elements of the rules of claim preclusion in Wisconsin:

> Under the doctrine of claim preclusion, a subsequent action is barred when the following three factors are present: (1) identity between the parties or their privies in the prior and present suits; (2) prior litigation resulted in a final judgment on the merits by a court with jurisdiction; and (3) identity of the causes of action in the two suits.

Sopha v. Owens-Corning Fiberglas Corp., 601 N.W.2d 627, 637 (Wis. 1999). In this case there was a specific finding by the ALJ that he lacked jurisdiction to grant the relief requested by Froebel.

> The ALJ concludes that the Division does not have authority to order the Department to draw up a remedial action plan to address the sediment loading in the Oconomowoc River and

> North Lake. Administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. *American Brass Co. v. State Bd. of Health*, 245 Wis. 440 (1944).

In re Removal of Funks Dam, 1996 WL 263059, App. 135a-36a. Given the explicit conclusions of the State ALJ and the Wisconsin Court of Appeals regarding their limited jurisdiction and authority, Wisconsin would clearly not apply claim preclusion in this case.

The case relied on by the Seventh Circuit, *Northern States Power Co. v. Bugher*, 523 N.W.2d 723 (1995) is completely inapposite to this case. *Northern States* involved a claim under 42 U.S.C. § 1983, seeking recoupment of taxes under an allegedly unconstitutional state taxation scheme. *Id.* at 547-48. As such, the action could not have been brought in federal court because it would have run afoul of the Tax Injunction Act, 28 U.S.C. § 1341. *See Hogan v. Musolf*, 471 N.W.2d 216 (Wis. 1991). More importantly, in *Hogan*, the Wisconsin Supreme Court had already concluded that the administrative remedy before the Wisconsin Tax Appeals Commission was "plain, adequate and complete." *Id.* at 223; *citing Fair Assessment in Real Estate Assn. v. McNary*, 454 U.S. 100, 116 (1981). And, unlike this case, the Wisconsin Supreme Court had also concluded that the Tax Appeals Commission had limited jurisdiction to consider the constitutionality of continuing a state taxation scheme.

> Where the United States Supreme Court has held that another state's taxing scheme, which is substantially similar to Wisconsin's, violates federal law or the constitution, we conclude that the Department and the Commission have the authority to determine whether the continued application of the Wisconsin taxing scheme also violates federal law or the constitution.

Hogan, 471 N.W.2d at 224.

Based on these holdings, the Wisconsin Supreme Court in *Hogan* held that a § 1983 action could not be commenced until after the available administrative remedies had been exhausted. The problem for Northern States was that it could not exhaust its administrative remedies because it had failed to raise the constitutional issue before Tax Appeals Commission in a timely fashion, thereby depriving the reviewing court of the ability to consider the issue. *Northern States*, 525 N.W.2d at 547. The case does not support the application of claim preclusion where, as here, the State ALJ and the Wisconsin Court of Appeals concluded that they had no jurisdiction or authority to afford Froebel any relief.

Finally, the patent error of the Seventh Circuit's decision in this case is demonstrated by the fact that the same judge, Judge Wood, writing for a different panel of the same court, applying the same Wisconsin law, in a case where the administrative agency actually had jurisdiction to grant meaningful relief, reached exactly the opposite conclusion as the panel in this case. On July 17, 2000, while Froebel's petition for rehearing was still pending before the Seventh Circuit, the court issued its decision in *Staats*, 220 F.3d 511, reversing the district court's application of

claim preclusion in a case arising under the Americans with Disabilities Act, 42 U.S.C. § 1201, et seq.

The procedural history in *Staats* involved a County employee who suffered from bipolar disorder. The County eliminated his position of employment, and he filed a discrimination claim under the Wisconsin Fair Employment Act ("WFEA"), § 111.31, Wis. Stats. The case was heard by an ALJ, who ruled in his favor, but the ALJ was reversed on appeal to the Labor and Industry Review Commission ("LIRC"), which found no violation of the WFEA. The employee timely sought judicial review in the state circuit court under Chapter 227, Wis. Stats., and the circuit court affirmed the decision of the LIRC, based on the administrative record. *Id.* at 513.

At the same time as he was pursuing his administrative remedies under the WFEA, the employee filed a claim with the Equal Employment Opportunities Commission ("EEOC"), asserting that he had been discriminated against on the basis of his medical condition. The EEOC issued a "right to sue" letter, and the employee filed his complaint in federal district court. The County moved to dismiss the complaint on the ground that the prior judgment in the state circuit court barred the subsequent federal lawsuit. The district court agreed with the County and dismissed the Complaint on the basis of claim preclusion. *Id.* at 514.

The Seventh Circuit reversed, citing its own decision in *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996) and this Court's decision in *Marrese* as support for the proposition that claim preclusion was inappropriate. *Staats*, 220 F.3d at 516. The Seventh Circuit also rejected the

notion that the employee could have commenced two separate actions in state court and then move to have them consolidated. *Id.* at 517; *citing Hanlon v. Town of Merton*, 612 N.W.2d 44, 48-9 (Wis. 2000) (holding that failure to join a 42 U.S.C. § 1983 claim with a certiorari proceeding under Chapter 68, Wis. Stats., did not result in the § 1983 claim being precluded).

Froebel submits that it is impossible to reconcile the decision in this case with the decision in *Staats*, or the Seventh Circuit's decisions in *Waid* and *Patzer v. Board of Regents*, 763 F.2d 851, 855 (7th Cir. 1985). Although the Seventh Circuit speculated that the jurisdiction of the State ALJ or the Wisconsin Court of Appeals might have been broad enough to entertain Froebel's claim under 33 U.S.C. § 1365, *Froebel*, 217 F.3d at 936,[15] *Staats*, 220 F.3d at 517, such speculation was clearly inconsistent with the State ALJ's and the Wisconsin Court of Appeals' construction of their own, very limited jurisdiction.

The seemingly random application of claim preclusion by the Seventh Circuit is inconsistent with the prior decisions of this Court. It also frustrates the purpose of 33 U.S.C. § 1365 and other statutes creating federal rights and causes of action. Potential plaintiffs should know when, where and how to assert those rights and causes of action without risking claim preclusion if they unwittingly chose the wrong forum. The Court should accept review of this

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[15] A cursory review of the case cited by the Seventh Circuit for this proposition, *Badger Paper Mills, Inc. v. Wisconsin Department of Natural Resources*, 452 N.W.2d 797, 800 (Wis. App. 1990), will demonstrate that it doesn't stand for the proposition for which it was cited.

case to clearly establish when claim preclusion is appropriate in these circumstances.

III. The Court of Appeals Improperly Resolved Disputed Facts in an Appeal From a Judgment Entered Upon Motions Pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6).

The Seventh Circuit found that it could not rely on claim preclusion to affirm the dismissal of the claim against Waukesha County. *Froebel*, 217 F.3d at 934. The Seventh Circuit acknowledged that other Circuits had considered when a dam can be a point source of pollutants, *id*, at 937,[16] but it relied on the "facts" of this case to distinguish the decisions of other circuits.

> Our case, at least as far as Waukesha County goes, presents a very different problem. Funk's Dam is mostly gone, and the supposed "point source" is really nothing more than the hole through which the Oconomowoc River flows unrestrained.

Id. at 937. These are disputed facts. Funks Dam is not "mostly gone." It is still there, albeit with a hole in it. Nor does the Oconomowoc River flow through the dam "unrestrained." The carrying capacity or flow capacity of the hole in the dam is not sufficient to handle the flow of the river after large storm events. As a result, the river backs

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[16] The court cited to *Committee to Save Mokelumne River*, 13 F.3d at 308; *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988); *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 n.22 (D.C.Cir. 1982); *Missouri ex rel. Ashcroft v. Department of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982).

up behind the dam, the churning waters scour more accumulated sediment from the bottom of the Dam Impoundment, and another pulse of silt and sediment is discharged through the hole in the dam to the riverbed and lake downstream.[17]

The complaint was dismissed on the basis of motions filed pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6). The district court correctly recognized that it was bound to accept all well pleaded facts in the complaint as true, drawing all reasonable inferences in favor of the plaintiff, and only grant the motion if the plaintiff could prove no set of facts entitling him to relief. *Froebel*, 13 F. Supp.2d at 848; *citing General Elec. Capital Corp. v. Lease Resolution Corp.* 128 F.3d 1074, 1080 (7th Cir. 1997). Froebel submits that the Seventh Circuit should have followed the same rules. It should not have resolved factual issues to fit its decision.

Counsel for Froebel did not concede that the Clean Water Act cannot apply to a passive owner of a point source of pollutants. What was conceded was that Waukesha County had not been actively involved in breaching Funks Dam and that Waukesha County was not engaged in any active conduct, including doing anything to mitigate or stop the sediment discharges from the Dam Impoundment. However, just because you are merely a passive owner of a building with a pipe discharging pollutants to a river, doesn't mean you don't have a legal

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[17] The hydraulic mechanics of the situation were explained in the affidavit and report of Dr. Jerry Kaster, which was submitted to the district court in support of Froebel's motion for reconsideration in the district court. *See* App. 90a.

obligation to stop the discharge or get a permit for it. *See, e.g., Driscoll*, 181 F.3d at 1290-91.

CONCLUSION

The Seventh Circuit's decision in this case is anomalous in its holding that a State ALJ, with limited statutory jurisdiction, and a state court conducting a limited administrative judicial review proceeding, nonetheless have jurisdiction to entertain a citizen suit under 33 U.S.C. § 1365. Its application of claim preclusion in this case is plainly inconsistent with the prior decisions of this Court, Wisconsin rules of claim preclusion, and the Seventh Circuit's own decisions. The disposition respecting Waukesha County substantially undercuts an important federal environmental protection statute.

Based on the foregoing points and authorities, Froebel urges the Court to grant this petition, accept review of this matter and reverse the decision of the Court of Appeals.

Respectfully submitted,

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In the

United States Court of Appeals

for the Seventh Circuit

No. 98-3925

KURT FROEBEL

Plaintiff-Appellant,

v.

GEORGE E. MEYER, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 97-C-654 – **Lynn Adelman, *Judge.***

ARGUED MAY 14, 1999 – DECIDED JUNE 28, 2000

BEFORE FLAUM, EASTERBROOK, and DIANE P. WOOD, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judge.* In 1992, the Wisconsin Department of Natural Resources ("WDNR") completed the process of destroying Funk's Dam, which had blocked the Oconomowoc River for nearly 150 years. After the dam was removed, silt and sediment that had built up over nearly 150 years damaged the river downstream from the former dam. Kurt Froebel believed that these actions violated state environmental laws, so he sought a Wisconsin administrative order requiring the defendants to fix the problem. His efforts were stymied both there and on appeal to the Wisconsin courts.

Froebel then turned to federal court, where he filed the complaint in this action under the citizen suit provision of the Clean Water Act ("CWA"), 33 U.S.C. § 1365 (1994). The district court held that Froebel's suit was not barred by claim preclusion, but that his complaint should be dismissed for failure to state a claim. We agree that dismissal was proper, but for largely different reasons. Froebel's claims, except those against Waukesha County, are indeed barred by claim preclusion. We agree that Froebel has not stated a claim against the county, and we therefore affirm the district court's judgment in its entirety.

I

Funk's Dam was built in 1850. It dams the Oconomowoc River near the town of Merton, Wisconsin. Over the next 115 years, it was rebuilt twice, but in 1965 it washed out and was not repaired. In 1971, WDNR informed the dam's owner, Gerald Quinn, that it needed to be fixed, but Quinn refused and in 1975 the dam washed out again. Quinn again failed to comply with the agency's orders, prompting WDNR in 1982 to declare the dam unsafe and abandoned. At that point, the agency indicated that it intended to remove the dam. However, WDNR did not have access to the funds necessary for removal until nearly ten years later.

Finally, in August 1992, WDNR began the drawdown process and conducted hearings concerning the dam's removal. On October 2, removal began. In devising its removal strategy, WDNR relied on two studies conducted by its employees. The first was a 1986 sediment survey

conducted by employee Mike Bozek. The goal of the survey was to try to predict the amount of silt and soft sediment that would be sent down the river after the dam was removed. Based on his study, Bozek recommended that WDNR construct a sediment pit upstream from the dam. The other study was a drawdown plan prepared by WDNR Assistant Dam Safety Engineer William Sturtevant. Sturtevant's plan recommended pumps and siphons to remove sediment, as well as traps both upstream and downstream from the dam. Based on the minimal consequences to the river if these plans were followed, WDNR decided that an environmental impact analysis would be unnecessary.

Unfortunately, the dam removal did not proceed in nearly as orderly a fashion as it would have if either Bozek's or Sturtevant's plan had been followed. WDNR officials and contractors concluded that Sturtevant's recommendations were not feasible given the conditions surrounding Funk's Dam, but they do not appear to have spent a great deal of time developing alternatives. No upstream sediment trap was put in place, and the downstream trap was inadequate for the task (though this may be because Bozek's study severely underestimated the likely sediment flow after removal). Moreover, there is at least some indication that WDNR's contractor took silt from the downstream trap and, rather than transporting it down river, pumped it right back into the channel near the dam. The consequences of all of this for the Oconomowoc River were severe – muck and silt bars replaced the gravel spawning grounds for indigenous fish and much of the local flora was buried under a foot of silt.

Meanwhile, the North Lake Management District ("District") filed a petition for a contested case hearing to challenge WDNR's actions. Froebel, an area resident who frequently used that region of the river for hunting and fishing, intervened. The District and WDNR settled, leaving Froebel as the sole plaintiff against WDNR. The first step was an administrative hearing before Wisconsin Administrative Law Judge Jeffrey Boldt. Froebel requested an order requiring WDNR to undertake remedial steps to repair damage done to the river. However, ALJ Boldt concluded that WDNR had acted within the discretion conferred by Wisconsin statutes and refused to order any remedial actions. Under Wisconsin's administrative review statute, Froebel's next stop was the circuit court (Wisconsin's first level of courts) for Waukesha County. That court affirmed the ALJ's conclusions, also finding that a provision of Wisconsin's dam removal code conferred upon WDNR the discretion to remove the dam as it saw fit. Froebel appealed to the Wisconsin Court of Appeals, which also affirmed. *Froebel v. Wis. Dept. of Natural Resources*, 579 N.W.2d 774 (Wis. Ct. App. 1998). The appellate court reasoned that since Froebel did not show that WDNR had acted contrary to any Wisconsin statute, the circuit court could not order injunctive relief against it.

Having no luck in Wisconsin courts, Froebel then brought a citizen's suit under the CWA. See 33 U.S.C. § 1365. He sued WDNR, as well as Sturtevant and WDNR Secretary George Meyer (collectively, the "state defendants"), alleging that WDNR's actions violated both Section 402, 33 U.S.C. § 1342, and Section 404, 33 U.S.C. § 1344, of the CWA. Section 402 establishes the National

Pollutant Discharge Elimination System ("NPDES"), which creates a permitting program for the discharge of pollutants. Froebel contends that the silt that was sent through the dam is a pollutant and that WDNR thus violated Section 402 by failing to comply with the permit requirement. Section 404 regulates the discharge of fill materials into navigable waters and creates a permitting scheme administered by the U.S. Army Corps of Engineers. Froebel argues that the removal of Funk's Dam led to a discharge of fill materials for which WDNR should have sought a permit.

Additionally, Froebel added a new defendant in his federal complaint, Waukesha County. The county was not involved in the removal of Funk's Dam, but it owned the property on which the dam was located at the time Froebel brought his federal suit. Froebel concedes that Waukesha County had nothing to do with the events of 1992, but he argues that the county continues to violate Sections 402 and 404 because the particles that naturally flow down the river past the point where the dam used to be constitute both a pollutant and fill material.

The district court dismissed WDNR on sovereign immunity grounds. In Froebel's favor, it ruled both that the action against Meyer and Sturtevant was a proper application of *Ex parte Young*, 209 U.S. 123 (1908), and that the Wisconsin judgment did not have the effect of precluding Froebel's federal claims. Having won these battles, Froebel nonetheless lost the war: the district court ultimately ruled that Froebel had failed to state a claim under either Section 402 or Section 404. Froebel now appeals everything except the dismissal of WDNR.

II

Since Wisconsin courts have already rendered a judgment in an action between Froebel and WDNR, claim preclusion is an obvious concern. By not having raised his CWA claims before either the Wisconsin administrative law judge or the Wisconsin courts, Froebel may now be precluded from asserting a Clean Water Act violation in conjunction with the very same dam removal that formed the basis of his earlier Wisconsin action.

A

Before we examine claim preclusion, however, we must first address a waiver problem created by the defendants' briefing strategy. On appeal, only Waukesha County raises a preclusion argument. The state defendants dedicate their entire brief to the merits of Froebel's Section 402 and 404 claims, as well as their argument that they enjoy sovereign immunity. Ordinarily, this would be a substantial problem, since arguments not raised in a brief are usually deemed waived. See, *e.g.*, *Hentosh v. Herman M. Finch University of Health Sciences/The Chicago Medical School*, 167 F.3d 1170, 1173 (7th Cir. 1999); *Finance Investment Co. (Bermuda) Ltd. v. Geberit AG*, 165 F.3d 526, 531 (7th Cir. 1998); *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). The state defendants did not even coordinate their briefing with that of the county and indicate that they were adopting the county's preclusion argument by reference, as they might have done. See Fed. R. App. P. 28(i); *Bruner Corp. v. R.A. Bruner Co.*, 133 F.3d 491, 498 n.7 (7th Cir. 1998). Under the circumstances, we think it

inappropriate to extend the County's preclusion arguments to the state defendants.

Nonetheless, the fact that the district court ruled in the defendants' favor, and explicitly addressed the preclusion issue, saves them from themselves. Because their position on appeal seeks only to maintain the status quo, we apply "a degree of leniency" to the state defendants' failure to raise all possible grounds for affirming the lower court. See *Schering Corp. v. Illinois Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996) (noting that "[t]he urging of alternative grounds for affirmance is a privilege rather than a duty"). This means that so long as the state defendants did not waive their preclusion argument by failing to present the issue to the district court, we may consider it. *Door Systems, Inc. v. Pro-Line Door Systems, Inc.*, 83 F.3d 169, 173 (7th Cir. 1996).

From that standpoint, the state defendants are on firm ground: they raised their preclusion argument before the district court. In addition, our consideration of this point vis á vis the state defendants (as opposed to the County) will not prejudice Froebel. The fact that Waukesha County raised the argument on appeal means that Froebel was prepared to meet the point. Indeed, he addresses it in his reply brief, where he makes the erroneous point that the County would have had to file a cross-appeal to preserve the right to attack the district court's ruling on this issue. No cross-appeal is necessary unless the appellee wants the court of appeals to alter the judgment, not just the reasoning, of the district court. *See Stone Container Corp. v. Hartford Steam Boiler Inspection & Ins. Co.*, 165 F.3d 1157, 1159 (7th Cir. 1999).

B

Under 28 U.S.C. § 1738, federal courts must give the judgments of state courts the same full faith and credit that those judgments would receive in the rendering state's courts, as long as the state judgment satisfied constitutional due process requirements. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982). See also *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). Even if the state court formally would not have had jurisdiction to hear the later claim, because it fell within the exclusive jurisdiction of the federal courts, § 1738 requires the federal court to analyze the case by asking what preclusive effect the state would give the first judgment in analogous circumstances. *Marrese*, 470 U.S. at 380. The question for us is therefore whether the Wisconsin courts would find the CWA action Froebel has brought precluded by his prior litigation. We conclude that they would.

The Wisconsin Supreme Court recently summarized its approach to deciding when a subsequent action is barred in *Sopha v. Owens-Corning Fiberglas Corp.*, 601 N.W.2d 627 (Wis. 1999). There the court indicated that three factors had to be present in order to preclude the later action:

> (1) identity between the parties or their privies in the prior and present suits; (2) prior litigation resulted in a final judgment on the merits by a court with jurisdiction; and (3) identity of the causes of action in the two suits.

Id. at 637. See also *Northern States Power Co. v. Bugher*, 525 N.W.2d 723, 728 (Wis. 1995).

The first question is therefore whether the parties here are the same, legally speaking, as the parties who participated in the Wisconsin proceedings. The answer is yes, because of the way Wisconsin treats challenges to administrative action. While the Wisconsin action named only WDNR, Froebel's current action is targeted at not only WDNR but also Meyer (in his official capacity), Sturtevant (in his individual capacity), and Waukesha County. Under Wisconsin preclusion law, Meyer and Sturtevant are viewed as identical to WDNR since Froebel's complaints against them concern only their actions as employees of the agency. See *Northern States Power*, 525 N.W.2d at 728 (finding identity of parties in prior suit against agency and action against officers acting in their official capacities); *Lindas v. Cady*, 499 N.W.2d 692, 699 (Wis. Ct. App. 1993) (holding that a suit against an employer generally precludes subsequent suits against the employees, even in their individual capacities, when the conduct forming the basis of the complaint was part of the employees' job functions), *aff'd. on other grounds*, 515 N.W.2d 458 (Wis. 1994).

Waukesha County is different. There is no indication from the record that Waukesha County (which is a party to this case only because it owns the land on which Funk's Dam used to sit) had anything to do with either the decision to remove the dam or Froebel's litigation in the Wisconsin courts. It is therefore unlikely that if Froebel were to bring a suit solely against the county in Wisconsin court that the court would dismiss his case on claim preclusion grounds. Moreover, the county and

WDNR defendants were represented by different counsel both in the district court and on appeal, a fact that the Wisconsin Supreme Court suggests is important in evaluating whether parties are identical for preclusion purposes. See *Northern States Power,* 525 N.W.2d at 728. Because the County cannot satisfy the first factor, Froebel's claims against it are not barred; we discuss them below.

The third factor – identity of the causes of action – is also satisfied under Wisconsin's transactional approach to claim preclusion. Under this approach, "the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Northern States Power,* 525 N.W.2d at 729, quoting Restatement (2d) of Judgments § 24(1) (1982). The Wisconsin courts focus on facts, not legal theories, to determine whether an action is precluded. See *Northern States Power,* 525 N.W.2d at 729 ("[T]he number of substantive theories that may be available to a plaintiff is immaterial – if they all arise from the same factual underpinnings they must all be brought in the same action or be barred from future consideration."). Here, Froebel is complaining about the procedures employed in the 1992 removal of Funk's Dam, just as he did before the Wisconsin ALJ and courts. The two cases arise out of the same transaction or series of transactions.

We have saved the second factor for last because it presents additional complications. The Wisconsin proceedings plainly ended in a final judgment on the merits of Froebel's challenge to WDNR's conduct in removing Funk's Dam. The fact that Froebel's first case began in an

administrative setting does not change this fact. *Acharya v. Am. Fed'n of State, County, and Municipal Employees*, 432 N.W.2d 140, 142 (Wis. Ct. App. 1988). Compare *City of Chicago v. Intern. College of Surgeons*, 522 U.S. 156 (1997) (supporting removal jurisdiction in a case that began as an administrative proceeding, that was appealed to the state circuit court where federal claims were added to the administrative review issues, and that was then removed to federal court). On the other hand, the judgment must have been rendered "by a court with jurisdiction." That phrase implicates one of the exceptions to the rule against claim splitting recognized by the Restatement (Second) of Judgments, which the Wisconsin Supreme Court normally follows. See, *e.g.*, *Sopha*, 601 N.W.2d at 637. Section 26 of the Second Restatement outlines exceptions to the general rule against claim splitting, and one of those exceptions is as follows:

> (c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief. . . .

Restatement (2d) Judgments § 26(1)(c).

Froebel argues that this was precisely his problem in the Wisconsin proceedings: he is now presenting a federal Clean Water Act claim that, he says, would not have been

entertained in the state proceedings because of limitations on the authority of those tribunals. If that were true, then it is our best guess that Wisconsin itself would permit this later suit, and thus it could proceed in federal court. Compare *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129, 140 (3d Cir. 1998) (finding that New York courts, which also follow the transactional approach to claim preclusion, would so rule). But, unlike the litigant in *Crossroads*, Froebel never even asked the Wisconsin administrative or judicial tribunals to entertain his CWA claims, and it appears to us that, had he asked, they could have done so.

The first indication that this is true comes from *Northern States Power*, in which the Supreme Court of Wisconsin considered a claim preclusion problem similar to the one presented in this case. There, a Wisconsin taxpayer failed to raise a federal constitutional challenge to a decision by the Wisconsin Department of Revenue denying a claimed deduction, instead relying solely on its interpretation of the governing Wisconsin statute. *Northern States Power*, 525 N.W.2d at 726. The taxpayer then brought a claim under 42 U.S.C. § 1983 against various state officials, alleging that the state tax was unconstitutional as applied to its case. The Wisconsin Supreme Court held that the Section 1983 suit was barred by claim preclusion because the taxpayer failed to raise the federal constitutional issue before either the state administrative agency or the reviewing courts. This, of course, is a precise parallel to Froebel's case: after failing to raise any Clean Water Act issues in state proceedings, he now wishes to vindicate federal rights in a subsequent suit.

The district court concluded that *Northern States Power* was distinguishable from Froebel's situation because it believed that the Wisconsin administrative tribunal and courts in *Northern States Power* had the authority to grant the requested relief, whereas here the Wisconsin Court of Appeals indicated that neither the administrative agency nor the state lower court could grant Froebel's request for an injunction. As a result of this conclusion, the district court thought that it would be fundamentally unfair to apply preclusion to Froebel's current claim because of the limits on the Wisconsin courts' remedial powers. The district court was right to raise these equitable considerations, since "Wisconsin law does not treat *res judicata* as an ironclad rule which must be implacably applied whenever its literal requirements are met, regardless of any countervailing considerations." *Sopha*, 601 N.W.2d at 638, quoting *Patzer v. Board of Regents*, 763 F.2d 851, 856 (7th Cir. 1985). See also *McCourt v. Algiers*, 91 N.W.2d 194, 196 (Wis. 1958) (indicating that *res judicata* may not apply where relitigation is necessary to prevent unfairness).

That said, we believe that the district court misinterpreted the Wisconsin courts' reasons for disposing of Froebel's claim. Wis. Stat. § 227.57(9), which prescribes the procedures for judicial review of agency actions, allows the reviewing court "to provide whatever relief is appropriate irrespective of the original form of the petition." In the Wisconsin litigation, Froebel contended that this section granted the reviewing court the power to enjoin WDNR and compel a restoration of the affected region of the Oconomowoc river. The court of appeals rejected this claim, but did so because "the circuit court

found that the ALJ had correctly interpreted the law and found no other grounds upon which to set aside or modify the agency decision." *Froebel*, 579 N.W.2d at 780-81. In other words, the Wisconsin circuit court could not enjoin the defendants because it found no legal basis for doing so. Along the same lines, the court of appeals held that Wis. Stat. § 227.57(2) requires a reviewing court to affirm an agency decision "unless the court finds a ground" for setting it aside or modifying it. *Id.* So, the reason that WDNR could not be enjoined was that Froebel had not presented a legal basis for doing so.

The federal Clean Water Act might have provided such a basis. Other Wisconsin cases indicate that it is permissible to raise federal environmental law in state administrative litigation. See, *e.g.*, *Badger Paper Mills, Inc. v. Wis. Dept. of Natural Resources*, 452 N.W.2d 797, 800 (Wis. Ct. App. 1990) (requiring party to raise Clean Water Act arguments before ALJ prior to seeking state judicial review). Supposing that Froebel's claim that the state defendants had violated the Clean Water Act is correct, ALJ Boldt may have concluded that WDNR was acting illegally. Froebel could have further argued this point to the Wisconsin state courts. Under yet another section of the Wisconsin administrative review provisions, Wis. Stat. § 227.57(8), a reviewing court "shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion . . . is otherwise in violation of a constitutional or statutory provision." There is no reason to think that Froebel could not have argued to both the ALJ and the circuit court that the Wisconsin provisions as interpreted by WDNR violated the federal Clean Water Act. If he prevailed, then the Wisconsin courts would

have concluded that WDNR's removal of Funk's Dam was "otherwise in violation of a constitutional or statutory provision." That would have offered a basis in law to modify the ALJ's decision and, under § 227.57(9), fashion appropriate relief.

Furthermore, the Wisconsin courts' reasoning in disposing of Froebel's claim makes it clear that the outcome of his state case could have been very different had he chosen to raise the Clean Water Act arguments that he makes here. Both the Wisconsin circuit and appellate courts upheld WDNR's actions by reference to Wis. Stat. § 31.187(1), which provides:

> The department may remove or cause to be removed, in such manner as it deems fit, old and abandoned dams in streams in this state, upon giving 60 days' notice in writing to the owner thereof, if the owner can be found.

The court of appeals concluded that the authority to remove dams "as it deems fit" confers on WDNR nearly unfettered discretion with respect to dam removal. *Froebel*, 579 N.W.2d at 781.

However, there is no doubt that Wisconsin cannot give discretion to its administrative agencies to violate federal law, since such a statute would run contrary to the Supremacy Clause. See U.S. Const. Art. VI, § 2. If Froebel's substantive claim – that WDNR violated both Section 402 and Section 404 of the Clean Water Act – is correct, then Wis. Stat. § 31.187 cannot extend to WDNR the complete discretion that the Wisconsin courts found. See, *e.g.*, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978) ("[A] state statute is void to the extent that it

actually conflicts with a valid federal statute."). We presume that Wisconsin officials and courts would have faithfully applied federal standards if Froebel had given them the chance. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 274 (1997). So, if Froebel is right on the merits, we doubt that the Wisconsin courts would have interpreted Wis. Stat. § 31.187 to give the agency the authority to act anyway.

In short, *Northern States Power* indicates that Froebel's present action against the state defendants could have been entertained in the earlier Wisconsin proceeding. For those who are keeping score, we note that we have now made equivalent findings with respect to this aspect of claim preclusion for each of the three states within the circuit. See *Button v. Harden*, 814 F.2d 382 (7th Cir. 1987) (Illinois law); confirmed by *Stratton v. Wenona Community Unit Dist. No. 1*, 551 N.E.2d 640, 646-47 (Ill. 1990); *Leal v. Krajewski*, 803 F.2d 332, 335 (7th Cir. 1986) (Indiana law); *Atkins v. Hancock County Sheriff's Merit Board*, 910 F.2d 403 (7th Cir. 1990) (Indiana law, following *Leal*). Here, we find that all three requirements of Wisconsin's rule for claim preclusion are satisfied, and Froebel's new suit is barred.

III

Finally, we consider Froebel's claims against Waukesha County. Unfortunately for Froebel, the same lack of county involvement in the dam removal that saved his case from preclusion also undercuts both of the CWA theories that he presented in his complaint.

Froebel's first CWA claim is based on Section 402 of the CWA, requiring a permit for "the discharge of any

pollutant, or combination of pollutants." 33 U.S.C. § 1342(a)(1). "Discharge of a pollutant," in turn, is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). "Point source" is also a defined term; it means "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

We have not specifically decided whether and when a dam can serve as a point source, but several other circuits have dealt with this issue and all have concluded that, at least under some circumstances, a dam can meet the statutory definition of point source. *Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305, 308 (9th Cir. 1993); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 n.22 (D.C. Cir. 1982); *Missouri ex rel. Ashcroft v. Department of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982). In concluding that a dam is a "point source," these other courts have looked at the outlets from the dam itself, such as spillways, pipes, and valves. See, *e.g.*, *Committee to Save Mokulumne River*, 13 F.3d at 308, *Gorsuch*, 693 F.2d at 165.

Our case, at least as far as Waukesha County goes, presents a very different problem. Funk's Dam is mostly gone, and the supposed "point source" is really nothing more than the hole through which the Oconomowoc River now flows unrestrained. Froebel's theory is that the

former dam impoundment and a portion of a river channel can constitute a "point source" just because there used to be an artificial structure at that spot. Such a reading, however, has a number of problems. The first and most obvious is that the definition of "discharge of a pollutant" requires that the pollutant flow "to navigable waters from any point source." The most natural reading of this language is that the point source is distinct from navigable water.

The structure of the CWA's definition of "point source" (a "discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged") connotes the terminal end of an artificial system for moving water, waste, or other materials. See *United States v. Plaza Health Laboratories*, 3 F.3d 643, 646 (2d Cir. 1993) (noting that the definition "evoke[s] images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways"). If, for example, Waukesha County were precipitating silt from the impoundment into a pile on the riverbank, then pumping it back into the waterway using a pipe, the pipe would be a point source. Whether there would be an addition as understood in Section 402 we need not decide.

Finally, our reading is further reinforced by the fact that we apply a broad construction to the term "navigable water." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 964 (7th Cir. 1994). *Compare Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999), *cert. granted* 68 U.S.L.W. 3719 (U.S. May 23, 2000) (No. 99-1178)

(raising the question, not at issue here, whether the navigable waters encompass all areas used as habitat by migratory birds). The broad reach of "navigable waters" pushes the natural reading of "point source" back to the point at which an artificial mechanism introduces a pollutant. If, for example, an industrial polluter operated a facility that dumped waste into a pond that feeds a tributary to a river that flows to the ocean, the facility would be the point source. Otherwise, any point at which one waterway empties into another could be construed as a "point source," subjecting unsuspecting owners of these confluences to liability when pollutants flow downstream.

Froebel's other CWA claim against the county is based on Section 404, 33 U.S.C. § 1344, which establishes a permitting system for discharging dredged or fill material. He argues that the removal of the dam, as well as the ongoing scouring action of the river water as it passes through what used to be the Funk's Dam impoundment, constitutes a discharge of dredged or fill material that requires a permit.

The problem with Froebel's theory is that there is nothing in either the regulations or the case law interpreting Section 404 that indicates that a landowner can fall within the permit requirement for a "discharge" by doing absolutely nothing at all. A "discharge of dredged material" refers to "any addition of dredged material . . . including redeposit of dredged material other than incidental fallback" into navigable water. 33 C.F.R. § 323.2(d)(1). Similarly, a "discharge of fill material" is "the addition of fill material into waters of the United States." 33 C.F.R. § 323.2(f). The reference to "addition"

and "redeposit" strongly suggest that a Section 404 permit is required only when the party allegedly needing a permit takes some action, rather than doing nothing whatsoever (as Waukesha County has done here).

Froebel's theory is that as water passes through the opening where Funk's Dam used to be, it scours silt off of the bottom of the impoundment (the dredging), then deposits it downstream (the discharge or, alternatively, the fill for which Section 404 mandates a permit). It is not at all difficult to imagine that water could be used to dredge or fill a riverbed when a person directs the water for that purpose. However, Froebel presents no authority for the proposition that dredging can be a purely passive activity. He relies heavily on *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985). But *M.C.C.* just holds CWA is not limited to a narrow conception of dredging or filling – active, purposeful digging. In *M.C.C.*, it was the churning action caused by the defendant's boat operations that was the source of the dredging that the court found to fall within Section 404. But the point is that the defendant was doing *something*. So, while it is possible that the state defendants have engaged in unlawful dredging by removing Funk's Dam and allowing the Oconomowoc River to clean out the impoundment, Waukesha County has not.

Section 404, its underlying regulations, and cases applying its terms all have a common element that is lacking in Froebel's claims against Waukesha County – active conduct that results in the discharge of dredged or fill material. If the county were to pile silt on the riverbank and deliberately allow rainfall to wash it into the stream, then Section 404 might become relevant. Here,

however, Froebel's claim would essentially require Waukesha County to seek a permit to do nothing but continue to own the land. As even Froebel conceded at oral argument, that cannot be a correct interpretation of Section 404.

IV

Because Froebel's suit against the state defendants is barred by the judgment in the prior Wisconsin proceedings and his complaint does not state a cause of action against Waukesha County, the judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: June 28, 2000

BEFORE: Honorable JOEL M. FLAUM, Circuit Judge
Honorable FRANK H. EASTERBROOK, Circuit Judge
Honorable DIANE P. WOOD, Circuit Judge

No. 98-3925

KURT F. FROEBEL,
Plaintiff - Appellant

v.

GEORGE E. MEYER, WILLIAM D. STURTEVANT, WAUKESHA COUNTY, et al.,
Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Wisconsin

No. 97 C 654, Lynn Adelman, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

KURT F. FROEBEL,

Plaintiff,

v. **Case No. 97-C-654**

GEORGE E. MEYER, et al.,

Defendants.

DECISION AND ORDER

(Filed July 30, 1998)

Plaintiff Kurt Froebel brings this action under the citizen suit provision of the Federal Water Pollution Control Act, commonly called the Clean Water Act ("CWA" or "Act"), codified as amended at 33 U.S.C. §§ 1251-1387. *Froebel* alleges that defendants, who include the Wisconsin Department of Natural Resources ("DNR"), two DNR officials and Waukesha County, violated and continue to violate the Act by discharging pollutants into the Oconomowoc River and North Lake without the requisite permits, as a result of the DNR's poorly executed removal of Funk's Dam in 1992.

This case and the defendants' motions to dismiss raise several novel and thorny legal issues including: (1) the viability of the *Ex parte Young* doctrine in the context of CWA violations after two recent Supreme Court decisions on sovereign immunity[1]; (2) the DNR's potential

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[1] *See Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S.Ct. 2028 (1997); *and Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996).

accountability under a federal statute such as the CWA for non-enforcement actions performed under discretionary authority granted by Wisconsin law; and (3) the application of the relevant CWA permitting provisions, 33 U.S.C. §§ 1342 and 1344, to a fact situation involving dam *removal*, rather than dam construction or operation.

Count I of plaintiff's complaint alleges that defendants failed to secure a permit under 33 U.S.C. § 1342 or the analogous state permit provisions, Wis. Stat. § 283.31-.63, for the removal of Funk's Dam in 1992, or for the consequent and ongoing redeposit of silt and sediment into the downstream waters of the Oconomowoc River and North Lake. The plaintiff alleges that this shifting of sediment constitutes a "discharge of [a] pollutant" under 33 U.S.C. § 1311, or an "addition of [a] pollutant to navigable waters from [a] point source" as defined in § 1362(12)(A), requiring defendants to obtain the necessary permits.

Count II of plaintiff's complaint alleges that defendants failed to secure a permit under 33 U.S.C. § 1344 for the 1992 dam removal or for the same resulting transfer of sediment downstream, which allegedly continues to occur. The plaintiff claims that this transfer constitutes a "discharge of dredged or fill material" under § 1344 requiring defendants to obtain a permit from the Army Corps of Engineers, the entity that issues and administers this permit provision. *See* 33 U.S.C. § 1344(d).

All defendants filed motions to dismiss. The state defendants raise defenses of sovereign immunity, claim preclusion growing out of prior state administrative proceedings, and failure to state a claim upon which relief

can be granted. Accordingly, they move to dismiss both counts under Rule 12(b)(1), for lack of subject matter jurisdiction; and Rule 12(b)(6), for failure to state a claim. *See* Fed. R. Civ. P. 12(b). Waukesha County, which purchased the riparian property abutting Funk's Dam and the dam impoundment in December 1993, also moves to dismiss both counts under Rule 12(b)(6), for failure to state a claim upon which relief can be granted. *Id.* Based on the following analysis, I will grant the Wisconsin defendants' 12(b)(1) motion to dismiss because of sovereign immunity as to the DNR, but deny it as to the DNR officials. The remaining defendants' 12(b)(6) motions to dismiss will be granted on both counts.

I. FACTUAL BACKGROUND

The following facts are taken from the complaint and from the factual findings of Administrative Law Judge Jeffrey D. Boldt ("ALJ Boldt"), incorporated into the complaint by reference. *See In re Removal of Funk's Dam*, No. 3-SE-92-322 (Div. of Hearings and Appeals Feb. 21, 1996) ("ALJ Decision").

Funk's Dam sits approximately one mile upstream of North Lake on the Oconomowoc River in Waukesha County. Originally built in 1850 and later rebuilt several times, the dam first washed out in 1965. In 1971, the DNR notified the dam owner, Gerald Quinn, that the dam was in poor condition and needed repairs. The dam failed again in March 1975, prompting the DNR to issue an order requiring Quinn to repair the dam. Quinn refused to comply. In 1982, the DNR issued a determination that the dam was unsafe and had been abandoned and gave

notice of the agency's intention to remove it. Quinn challenged the DNR determination. Although the challenge was ultimately dismissed by the Wisconsin Court of Appeals in 1985, dam removal was delayed.

The Wisconsin legislature appropriated funds for removing abandoned dams in August 1991, and the DNR began preparations to remove Funk's Dam. On August 17, 1992, the DNR began a drawdown of the reservoir, or impoundment, behind the dam in anticipation of removal. On the following day, a public notice was issued, requesting comments on the dam removal and seeking input on the DNR's related Environmental Assessment ("EA"). A public informational hearing was held on September 9, 1992 regarding the imminent removal of the dam. At the hearing, DNR representatives assured the public that the agency's removal plan would guard against a significant or harmful environmental impact to downstream waters. In its EA, the DNR did observe that "an increase in sediment load to the lake is expected during drawdown." An Environmental Impact Statement ("EIS") on the dam removal project was never prepared, however, as the DNR determined that one was not needed. *See North Lake Management Dist. v. Wisconsin Dep't of Natural Resources*, 182 Wis.2d 500, 503 (Ct. App. 1994).

On October 2, 1992, the DNR contractor began the physical removal of the dam. At that time, Funk's Dam consisted of several 3-foot section gates, a 60-foot emergency spillway, and a 350-foot earthen embankment. No one disputes that the dam was unsafe and a menace to life, health, and property. The DNR's foremost concern was the potential for flooding due to dam failure. In

addition, the agency believed dam removal would reduce sediment transport by stabilizing the impoundment bottom. ALJ Boldt subsequently found that a clear preponderance of the evidence established that the DNR's decision to remove the dam was reasonable, given the serious concerns about public safety and sediment transport. ALJ Decision, Findings at ¶ 10.

Plaintiff Froebel cites poor implementation of the decision to remove the dam rather than the decision itself as the source of the environmental consequences giving rise to this litigation. In 1986, the DNR had conducted a study on the depth and distribution of the sediment upstream of Funk's Dam, with the object of predicting the relative consequences of dam removal and dam failure. In addition, DNR Assistant Dam Safety Engineer William Sturtevant, a named defendant in this action, prepared a formal drawdown plan in 1992. Both the 1986 study and the Sturtevant plan recommended certain steps be taken to ensure that the sediment transport triggered by dam removal was minimized.

Again, no one disputes that the DNR did not follow these recommendations in significant respects during dam removal. Specifically, no sediment basin or sediment barrier was placed upstream of the dam; downstream sediment traps were too small and were not properly pumped during removal; no pumps or siphons were installed along the embankment prior to drainage; and the dam itself was only partially removed, although the DNR's own EA had warned that partial removal would create instability and exacerbate sediment shifting.

The DNR has argued that on-site conditions, engineering problems, and other factors made it infeasible to follow all the recommendations made prior to removal. Heavy rains also plagued the drawdown, requiring additional drainage and producing more sediment transport than anticipated. While ALJ Boldt credited some of the DNR's explanations, he ultimately found as follows:

> [I]t is not at all clear from the record why [the extenuating] conditions were not foreseeable to Department personnel. . . . The Department was well aware of public concerns relating to the release of sediment at the time of dam removal. The record is replete with concerns on this exact issue expressed well prior to design of the drawdown plan. . . . The record does not adequately explain why [alternative measures] could not be implemented. Further, if larger sedimentation basins could not have been constructed, the Department should not have represented to the public that it would build them, nor that the DNR's efforts to collect sediment would be adequate to protect the navigable waters of the river and North Lake.
>
> . . .
>
> A preponderance of the credible evidence supports a finding that a large amount of sediment was discharged into the Oconomowoc River and North Lake as a result of the partial removal of the Funk's Dam. The record taken as a whole also establishes that these navigable waterways have been detrimentally impacted by the manner in which the partial dam removal was undertaken. . . . The DNR had sound reasons for removal of the dam; the Department

> properly planned for removal of the dam. However, as the dam was removed, the Department was too quick to throw out its drawdown and removal plans as being impossible to perform. . . .

ALJ Decision, Findings at ¶¶ 14, 19 (citations omitted).

The plaintiff alleges that silt, sediment and ongoing erosion continue to be discharged downstream through the channelized structure formed by the partially removed dam. As a result, large muck and silt bars which did not exist prior to removal have formed in the Oconomowoc River and at the river mouth in North Lake. The excess sediment transfer and silt deposits continue to impair the navigability of the river and lake and to damage the natural habitat of many species.

Prior to filing this action, plaintiff Froebel originally intervened in the state administrative review proceeding surrounding the removal of Funk's Dam, initiated by the North Lake Management District ("District"). *See North Lake*, 182 Wis.2d 500. In October 1992, the District filed a petition for a contested case hearing challenging the DNR's decisions to remove the dam and not to obtain an EIS regarding the project.[2] The DNR granted the District's

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[2] The dam removal hearing was stayed while Wisconsin courts determined whether § 227.42, Wis. Stat., confers a right to a contested case hearing on the need for an EIS. The Wisconsin Court of Appeals found no such right. *North Lake* at 506. In reaching this conclusion, the court relied on *Wisconsin's Envtl. Decade, Inc. v. Wisconsin Dep't of Natural Resources*, 115 Wis.2d 381 (1983), which held that the decision whether to hold a contested case hearing on the need for an EIS is within the DNR's sound discretion, as long as an opportunity for public

request for a hearing on the dam removal but not on the need for an EIS. *Id.* Froebel was permitted to intervene before the District ultimately withdrew its request, leaving the plaintiff and the DNR as the remaining litigants in a contested case hearing on the issue of dam removal. *See Froebel v. Wisconsin Dep't of Natural Resources*, ___ Wis.2d ___, ___, 1998 WL 88355, *1 (Ct. App. March 4, 1998). Specifically, Froebel sought to obtain an injunction ordering the DNR to halt the sediment discharge from the partially removed dam and to perform other remedial actions. *Id.*

The contested case hearing was held on March 6-8, 1995 in Milwaukee and April 4, 1995 in Waukesha. On February 21, 1996, ALJ Boldt issued his factual findings and legal conclusions, along with an order to remand the matter to the DNR for such actions as the agency in its discretion found appropriate. *See* ALJ Decision, Order. Froebel appealed to Waukesha County Circuit Court and then to the Wisconsin Court of Appeals. Both Wisconsin courts affirmed ALJ Boldt's findings and conclusions and concurred in this significant respect: Froebel's request for relief was rejected because Wisconsin law does not allow a state administrative or judicial authority to issue an injunction against the DNR. *See, e.g., Froebel*, at *1.

The plaintiff filed this action in federal court on June 6, 1997, seeking to hold the DNR and riparian owner Waukesha County accountable for the faulty removal of Funk's Dam and for the resulting transport of sediment

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participation exists and a reviewable record is assembled. *North Lake* at 505.

under the citizen suit provision of the federal Clean Water Act, 33 U.S.C. § 1365. The plaintiff seeks injunctive relief to prevent further sediment transport through the remainder of the dam and to remedy current sediment accumulation in the Oconomowoc River and North Lake, attributable to dam removal. The plaintiff also requests that civil penalties be imposed on defendants, pursuant to 33 U.S.C. § 1365(a) and § 1319(d). The court now turns to the defendants' motions to dismiss.

II. ANALYSIS

Two propositions underlie my analysis of this unusual fact situation. First, the actions for which the DNR and agency officers are being sued – namely, the manner in which the DNR removed Funk's Dam and the agency's subsequent inaction in the face of volume sediment shifting – are not *enforcement actions*. Removing a dam is an activity which private parties undertake, as well as, on occasion, state regulatory agencies. While the scope of agency discretion remains relevant to this action in many respects and is discussed below, the mere assertion of agency discretion in this context does not carry the same weight as it would in a classic enforcement setting. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."); and *Village of Menomonee Falls v. Michelson*, 104 Wis.2d 137, 145 (Ct. App. 1981) (overturning civil enforcement decision requires proving "intentional, systematic and arbitrary discrimination").

Second, the significance of permit requirements under the CWA or any environmental regulatory scheme is that the process of obtaining a permit generally requires an applicant to comply with certain common procedural safeguards – such as, for example, meaningful public notice requirements or requirements to monitor and report pollutant discharge. *See, e.g.*, Wis. Stat. § 283.39 and § 283.55. Thus, the fact that one of Froebel's claims suggests that the DNR was required by federal law to issue *itself* a permit is not, on its face, nonsensical. The gravamen of such a claim is simply that the agency should have followed its own procedural safeguards, which presumably would have prevented or minimized the alleged pollutant discharge.

I turn now to defendants' dispositive motions. In reviewing a complaint pursuant to any motion to dismiss, I assume all well-pleaded facts to be true, and draw all reasonable inferences from those facts in favor of the plaintiff. *Gutierrez v. Peters*, 111 F.3d 1364, 1368-69 (7th Cir. 1997). This court will dismiss an action pursuant to a 12(b)(6) motion for failure to state a claim if, under this generous standard, the plaintiff can prove no set of facts that would entitle him to relief. *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1080 (7th Cir. 1997); *see also Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The following analysis first addresses the state defendants' assertion of sovereign immunity, then determines the preclusive scope of the state administrative proceedings and judicial review, and finally discusses the remaining defendants' 12(b)(6) motions to dismiss with respect to both counts.

A. Sovereign Immunity

The Wisconsin defendants – a state agency and two officers of that agency – have moved to dismiss this action against themselves based on Eleventh Amendment sovereign immunity. The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The above text restricts only Article III diversity jurisdiction. The Supreme Court, however, has consistently construed the Amendment to bar federal question jurisdiction over suits brought against unconsenting states by their own citizens, thus enacting a blanket immunity for states from privately initiated suits in federal court. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) (citing *Hans v. Louisiana*, 134 U.S. 1 (1890), and progeny). The *Hans* interpretation of sovereign immunity has been roundly criticized by jurists and scholars as textually unwarranted and fundamentally at odds with two bedrock constitutional principles: that every right has a remedy and that federal judicial power is coextensive with the supremacy of federal law. *See generally* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 3-13 (1988), *and* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1466-92 (1987) (both citing *inter alia Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)); *see also* J. Brennan's dissenting opinion in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247-304 (1985).

Federal courts have circumvented the severe restriction on federal jurisdiction implied by this understanding of sovereign immunity in a number of ways. Principally, courts will find that a state has waived immunity and consented to suit; that Congress has effectively abrogated state sovereign immunity; and, finally, that citizens may sue state officials for prospective injunctive relief when the officials remain in violation of the Constitution or federal law, by pretending that the state itself is not the defendant in those instances. The plaintiff here relies solely on this last method of overcoming sovereign immunity, the so-called *Ex parte Young* exception. *Ex parte Young*, 209 U.S. 123 (1908), established the legal fiction that when state officers in their official capacity act *ultra vires* to the Constitution or federal law, they cannot represent the state because the state *qua* state cannot authorize unconstitutional or illegal conduct. However, the *Ex parte Young* exception, to the extent available, will only subject individual state officers to suit, but does not overcome Eleventh Amendment immunity for state agencies such as the DNR. *See, e.g., Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (" . . . [*Ex parte Young*] has no application in suits against the States and their agencies, which are barred regardless of the relief sought . . . "). Therefore, in order for the DNR to remain a defendant in this action, the agency's immunity must be overborne in some other fashion.

1. Congressional Abrogation

Froebel does not assert that the DNR has consented to suit or that the CWA citizen suit provision, 33 U.S.C.

§ 1365, represents a valid congressional abrogation of state sovereign immunity. And, indeed, after *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), the abrogation claim for an environmental statute such as the CWA appears difficult, if not impossible, to maintain. *Seminole Tribe* established a two-part test for determining whether a federal statute effectively abrogates the states' Eleventh Amendment shield. *Id.* at 1123. Section 1365 of the Act fails both tests, though not without troubling implications for environmental citizen suits in general.

a. Clear intent to abrogate

Under *Seminole Tribe*, a court must first determine if the statutory language clearly and unequivocally expresses Congress' intent to abrogate sovereign immunity and subject states to suit. *Id.* Section 1365 of the Act, which plaintiff claims affords him the right to sue the DNR, states:

> . . . any citizen may commence a civil action on his own behalf –
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency *to the extent permitted by the eleventh amendment to the Constitution*) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . .

33 U.S.C. § 1365(a) (emphasis added). The definition of "person" as used in the Act includes states. 33 U.S.C.

§ 1362(5). While enigmatic, Congress' reference to the Eleventh Amendment in § 1365 can hardly be said to constitute the necessary "clear legislative statement" of an intent to dispel sovereign immunity in citizen suit actions under the CWA. *Seminole Tribe* at 1123. This – and the fact that states have rarely been sued under the Act once it was established that state enforcement actions are not subject to suit, *see, e.g., O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 648 (E.D. Pa. 1981) – may account for the dearth of cases interpreting the § 1365 "to the extent permitted by . . . " language. Nevertheless, the plainest meaning of this language is that, far from being abrogated, the Eleventh Amendment retains some presumptive force under the Act.[3]

b. Valid exercise of power

More importantly, *Seminole Tribe* established a second line of inquiry to determine whether sovereign immunity

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[3] In this context, " . . . to the extent permitted by the eleventh amendment to the Constitution . . . " can mean that Congress intended citizens to sue either: (A) any "person" under the Act, but not states; or (B) any "person" under the Act, including states, but only in certain situations. The second possibility appears likely, since Congress could have simply said "excluding states" if it meant the jurisdictional bar to be applied without exception. The latter reading implies a sort of sovereign immunity continuum, which notion is consistent not with the Eleventh Amendment itself but with the contours of the *Ex parte Young* exception and other judicial constructions of sovereign immunity. Indeed, the Supreme Court has suggested that the CWA's citizen suit provision "implicitly authorized suit under *Ex parte Young*." *See Seminole Tribe* at 1133 n. 17.

has been validly abrogated by statute: the statute itself must have been passed "pursuant to a valid exercise of power." *Seminole Tribe* at 1124. And *Seminole Tribe* goes on to conclude that the Interstate Commerce Clause no longer constitutes the necessary grant of authority to Congress to abrogate state immunity. *Id.* at 1125-28. A majority of five justices in *Seminole Tribe* overruled the plurality opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which seven years earlier upheld a congressional abrogation of sovereign immunity in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"). In *Union Gas*, the Court held both that the legislature had clearly stated its intention that states be held liable for cleanup costs under CERCLA, along with private parties; and that the Interstate Commerce Clause authorized Congress to enact a statute to that effect. *Union Gas* at 5.

Seminole Tribe, which involved a suit against the State of Florida under the federal Indian Gaming Regulatory Act ("IGRA"), expressly overruled *Union Gas* as to the latter holding, finding instead that Congress had no power to abrogate state sovereign immunity under the Interstate Commerce Clause.[4] U.S. Const., art. I, § 8, cl. 3.

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[4] The IGRA was actually passed under the Indian Commerce Clause, also found at U.S. Const., Art. I, § 8, cl. 3. While noting that "[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause," the Supreme Court essentially conflates the two in its analysis, finding that neither confers the necessary power to

After *Seminole Tribe*, Section 5 of the Fourteenth Amendment remains the only valid basis upon which Congress can override sovereign immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.") *Seminole Tribe*'s contraction of Congress' abrogation authority thus deflates citizen suit jurisdiction under not only § 1365 of the CWA, but numerous environmental citizen suit provisions, all presumably passed pursuant to the Interstate Commerce Clause.[5] *See, e.g.*, the

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abrogate Eleventh Amendment immunity. *See Seminole Tribe* at 1126, 1125-28.

[5] *Seminole Tribe* has spurred litigation over the source of Congress' authority in enacting legislation. See cases cited in footnote 53 in Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L.Rev. 495, 508 n. 53 (1997). Generally, these cases have involved claims by plaintiffs that a given federal statute was, or at least could have been, passed pursuant to Congress' powers under the Fourteenth Amendment, since that finding alone can preserve an otherwise valid legislative abrogation of sovereign immunity. The Equal Protection, Due Process, and Privileges and Immunities Clauses have all been invoked, with mixed success, to assert Fourteenth Amendment authorization for an array of federal statutes, including the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Fair Labor Standards Act, and even copyright, trademark, patent and bankruptcy statutes. *Id. See, e.g. Chavez v. Arte Publico Press*, 139 F.3d 504, 508-12 (5th Cir. 1998) (finding abrogation of sovereign immunity in Copyright/Lanham Act unjustified by Fourteenth Amendment); *but see College Savings Banks v. Florida Prepaid Postsecondary Educ. Expense Bd.*, ___ F.3d ___, ___, 1998

Toxic Substances Control Act, 15 U.S.C. § 2619; the Endangered Species Act, 16 U.S.C. § 1540(g); the Noise

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WL 348012, *3-10 (Fed. Cir. June 30, 1998) (finding Patent Remedy Act validly abrogated sovereign immunity under the Fourteenth Amendment).

As courts have discovered, Congress does not always make its basis for action clear. But in the wake of *Seminole Tribe*, the Seventh Circuit has concluded that the appropriate question is not whether Congress did in fact enact a statute pursuant to the Fourteenth Amendment, but whether the objectives of the statute are within Congress' theoretical Fourteenth Amendment power. *See Doe v. University of Ill.*, 138 F.3d 653, 660 (1998). Applying this standard, the Seventh Circuit held that Title IX, 20 U.S.C. §§ 1681 *et seq.*, in conjunction with the Equalization Act, was enacted under Congress' Fourteenth Amendment antidiscrimination imperative, although prior cases had determined that the statute was a product of congressional power under the Spending Clause. *Id.* at 659-60.

Similarly, at least one writer suggests that environmental citizen suits to vindicate property interests are in some sense "authorized" by the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *See* F.J. "Rick" Dindinger II, *Seminole Tribe's Impact on the Ability of Private Plaintiffs to Bring Environmental Suits Against States in Federal Court*, 75 Denv. U.L. Rev. 253 (1997). However, the Supreme Court's opinion in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), clarified the substantive scope of Congress' power under the Fourteenth Amendment in such a way that litigation strategies of this type are likely to fail. A recent district court decision in Alabama distilled the import of *Boerne* as follows: "The teaching of *Boerne* is that there must be a substantial constitutional hook: the principal object of the legislation must be to address rights that are judicially recognized [as prohibited by the Fourteenth Amendment.]" *Reynolds v. Ballard*, ___ F. Supp. ___, ___, 1998 WL 286010, *16 (M.D. Ala. June 1, 1998). Considered in this light, environmental statutes such as the Clean Water Act cannot pass the *Boerne* test, and the claim of Fourteenth Amendment authority for their enactment appears specious.

Control Act, 42 U.S.C. § 4911; the Resource Conservation and Recovery Act, 42 U.S.C. § 6972; the Clean Air Act, 42 U.S.C. § 7604; *and* CERCLA, 42 U.S.C. § 9659. In light of *Seminole Tribe*, the *Ex parte Young* exception, discussed below, assumes greater importance, as the only way for citizens to sue state defendants for injunctive relief under many environmental statutes. *See generally* Courtney E. Flora, *An Inapt Fiction: The Use of the Ex parte Young Doctrine for Environmental Citizen Suits Against States After Seminole Tribe*, 27 Envtl.L. 935 (1997).

As the above analysis makes clear, congressional abrogation fails to vitiate the defendants' immunity in this action. Therefore, the Wisconsin defendants' motion to dismiss based on sovereign immunity is granted as to the DNR, and the agency is dismissed from this action.

2. The *Ex parte Young* Exception

The plaintiff's complaint also includes George Meyer, Secretary of the DNR, and Sturtevant,[6] the DNR assistant dam safety engineer, as defendants in this action. The plaintiff alleges that, in their capacity as DNR officials, Meyer and Sturtevant violated and continue to violate the Act by causing or allowing the impermissible and permitless discharge of pollutants from Funk's Dam. Under the judicial doctrine established by *Ex parte Young*, a suit alleging that a state officer violated federal law is not

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[6] The complaint caption identifies Sturtevant as "an individual," rather than by his DNR title. Throughout the pleadings, however, Sturtevant is implicated for actions taken as a dam safety engineer for the DNR.

considered a suit against the state, and thus is not barred by the Eleventh Amendment. The theory of *Young* was that, since a state cannot authorize unconstitutional or illegal conduct, the officer's action is *ultra vires* and "stripped of [its] official or representative character." *Young*, 209 U.S. at 160. The Supreme Court has modified and limited *Young*'s basic holding and rationale over the years, but the *Ex parte Young* doctrine remains an essential mechanism by which citizens can seek relief against state actors in federal court.

a. *Edelman* and other limitations on *Young*

Edelman v. Jordan, 415 U.S. 651 (1974), represents the most significant qualification on the *Young* exception to sovereign immunity. *Edelman* held that *Ex parte Young* permits only prospective injunctive relief against state officers. *Id.* at 677. Awards of retroactive monetary relief against state officers, even if equitable in nature, will necessarily be paid out of the state treasury, so the *Young* fiction that the suit is not against the state collapses. *Id.* at 666-67. As a threshold matter, then, the plaintiff's request that civil penalties be assessed against Meyer and Sturtevant under 33 U.S.C. § 1319(d) is barred. The irony, of course, which courts have recognized, is that compliance with injunctive orders properly issued under *Ex parte Young* will often have dramatic fiscal consequences for states. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970)

(enjoining New York City welfare officials from terminating welfare benefits without a hearing).[7]

Another implication of the *Edelman* restriction to prospective injunctive relief under *Ex parte Young* is that the unconstitutional or illegal action complained of must be ongoing in some sense, or capable of being prospectively enjoined. As it happens, this requirement dovetails with a prerequisite for citizen suit jurisdiction under the CWA. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), held that the § 1365(a) language allowing citizens to sue "any person . . . who is alleged to be in violation" under the Act required that citizen-plaintiffs allege "a state of either continuous or intermittent violation – that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney* at 57. Thus, Froebel must allege that both Meyer and Sturtevant, as well as Waukesha County, continued to violate the Act at the time he filed his complaint, in order to overcome sovereign immunity and secure citizen suit jurisdiction. He does.

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[7] In some fact situations the result of *Edelman*'s distinction is especially ironic:

> Federal courts may enjoin state officials in their official capacity to pay money out of the state treasury for future obligations, but may not order them to charge the public fisc to make whole victims of past constitutional wrongdoing. Perversely, a state government that spends money to avoid violating the Constitution ends up financially worse off that one that cynically flouts higher law until ordered into prospective compliance.

Amar, supra, at 1479.

The state defendants attempt to read another limitation into the *Ex parte Young* doctrine, so as to nullify its use for the plaintiff. The defendants argue that the prospective injunctive relief authorized by *Young* must also be passive and involve no affirmative action on the part of the state. In making this claim, the defendants rely on *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), and *Wisconsin Hosp. Assoc. v. Reivitz*, 820 F.2d 863 (7th Cir. 1987).

In *Reivitz*, the plaintiff hospitals wanted to enjoin state officials from considering a Wisconsin statute – which temporarily froze Medicaid rate increases to hospitals – in calculating as-yet-unpaid reimbursements to hospitals for already-rendered services. *Id.* at 867. The Seventh Circuit held that such an injunction could not be considered prospective in nature because it essentially dictated a form of retroactive monetary relief and was thus barred by the Eleventh Amendment. *Id.* This court finds that the facts of *Reivitz* are inapposite to the present case, and that the injunction was denied not because it required affirmative action by the state but because the requested relief involved make-whole payments from the state treasury.

The defendants also cite note 11 in *Larson*, which states:

> Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign

> or the disposition of unquestionably sovereign property.

Larson, 337 U.S. at 691 n.11. Referring to this as "*Larson*'s famous and debatable footnote 11," the Seventh Circuit has followed the lead of other circuits in declining to read the above language as "clos[ing] the courthouse doors to litigants solely because affirmative action may be required on the part of the government." *Schlafly v. Volpe*, 495 F.2d 273, 278, 279 (7th Cir. 1974). Rather, the Seventh Circuit construed *Larson*'s footnote as potentially barring a suit in only exceptional cases, "where to do otherwise would impose an intolerable burden on government functions, outweighing any consideration of private harm." *Id.* at 280 (internal quotation marks omitted). Contrary to defendants' suggestion, *Schlafly* is still good law in this circuit, and rather than being diminished by recent Supreme Court rulings on the *Ex parte Young* doctrine is, in fact, echoed by the prevailing rationale in *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997). *See infra* discussion. In any event, I find that the remedial actions requested by plaintiff would not impose an "intolerable burden on government functions," such as contemplated by *Larson*. *See, e.g., Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305 (9th Cir. 1993) (finding that action against members of state water quality control board was not barred although it requested remedial actions to remove and dispose of contaminated sediment).

b. *Young* after *Seminole Tribe* and *Coeur d'Alene*

Seminole Tribe and the more recent *Coeur d'Alene* – decided just after the plaintiff filed this action – whittle away at the scope of the *Ex parte Young* exception still further. Neither decision, however, impacts the availability or application of the *Young* doctrine in the present action.

In addition to finding that Congress lacks power to abrogate the states' sovereign immunity through legislation passed pursuant to the Commerce Clause, *Seminole Tribe* held that the *Ex parte Young* mechanism for circumventing sovereign immunity may be unwarranted when the statute at issue already prescribes a "detailed remedial scheme for the enforcement against a State of a statutorily created right." *Seminole Tribe*, 116 S. Ct. at 1132. Of course, under the Supreme Court's initial holding in *Seminole Tribe*, such a remedial scheme will fail to subject a state to suit if the legislation was a Commerce Clause enactment, because that abrogation of state immunity is now invalid. The Court's reasoning, somewhat counterintuitive, was that the presence of a complex remedial scheme directed at states was evidence of Congress' desire to *limit* the liability of states under the statute, rather than expose them to the potentially *greater* risks of *Ex parte Young* litigation. *Id.* at 1133 ("By contrast with this quite modest set of sanctions, an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of the federal court, including, presumably, contempt sanctions.") Thus, although the remedial scheme itself is ineffective against

the state under *Seminole Tribe*, suits under *Ex parte Young* are also precluded, in order to hew as closely as possible to perceived congressional intent. The ironic result is that, with respect to the very statutes in which Congress has shown its desire to subject states to suit, not only will abrogation fail, but the *Young* exception will also be unavailable to plaintiffs.[8]

However, footnote 17 in *Seminole Tribe* saves considering the relative complexity of the CWA's remedial scheme as directed at states. The note states:

> [W]e do not hold that Congress *cannot* authorize federal jurisdiction under *Ex parte Young* over a cause of action with a limited remedial scheme . . . . In this regard, [the IGRA] stands in contrast to the statutes cited by the dissent as examples where the lower courts have found that Congress implicitly authorized suit under *Ex parte Young*. Compare 28 U.S.C. § 2254(e) [sic] (Federal court authorized to issue an "order directed to an appropriate state official"); . . . *33 U.S.C. § 1365(a) (authorizing a suit against "any person"*

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[8] *See supra Jackson*, 72 N.Y.U.L.Rev. at 510-30, who argues that the reasoning of *Seminole Tribe* rests on the mistaken assumption that *Ex parte Young* always affords a free-standing remedy that is somehow broader than a statutory enforcement scheme:

> Logically, the Court's reasoning is flawed because it conflates the implied cause of action aspect of *Ex parte Young*, arguably of no relevance in a case involving a statutory cause of action and clear congressional intent for federal courts to help enforce the states' duty to [comply with the IGRA], with the Eleventh Amendment avoidance aspect of *Ex parte Young*.

Id. at 520.

> *who is alleged to be in violation of relevant water pollution laws).*

Id. at 1133 n. 17 (latter emphasis added). Thus, the Supreme Court indicated its belief that the reasoning of *Seminole Tribe* does not bar *Ex parte Young* suits under the CWA.

Although *Coeur d'Alene* also restricts the scope of the *Young* exception, the extraordinary factual context of the decision limits its holding to a narrow exception to the *Young* doctrine. In that case, the Coeur d'Alene Indian Tribe alleged ownership in the submerged lands and bed of Lake Coeur d'Alene and its tributaries and sought a declaratory judgment establishing the invalidity of all Idaho laws, customs, or usages regulating those lands, and an injunction prohibiting Idaho state officers from taking any action in violation of the Tribe's rights in the lands. *Coeur d'Alene*, 117 S. Ct. at 2030. The Tribe claimed the right to sue the Idaho state officers under *Ex parte Young*, to enjoin ongoing violations of privileges secured by federal law.

The Supreme Court denied all requested relief, concluding that *Young* did not apply in this context and the Tribe's claims were therefore barred by Eleventh Amendment immunity. But the Court's reasoning was quite narrowly drawn:

> [T]his case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests. . . .
>
> . . . [S]ubstantially all benefits of ownership and control would shift from the State to the Tribe. This is especially troubling when coupled

> with the far-reaching and invasive relief the Tribe seeks, relief with consequences going well beyond the typical stakes in a real property quiet title action. The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State.The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory.

Id. at 2040. Although there is some disagreement between the lead opinion (signed by two justices) and the plurality opinion (signed by three justices) as to the proper inquiry in evaluating a claim for relief under *Ex parte Young*,[9] both camps arrive at the same conclusion that the extraordinary relief requested by the Tribe made it impossible to maintain the *Young* fiction in this instance: "Where a plaintiff seeks to divest the State of all regulatory power

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[9] Justice Kennedy's principal opinion advocates a "case-by-case" balancing approach to the invocation of *Ex parte Young*, in which federal courts should weigh the availability of prompt relief in a state forum and the relative importance of the federal right being vindicated before allowing a suit to proceed under *Young*. *See Coeur d'Alene* at 2035-40. Justice O'Connor's plurality opinion, arguably controlling, rejects the case-by-case analysis as unnecessarily complicating and narrowing the *Young* jurisprudence. *Id.* at 2045. Instead, the plurality reaffirms the validity of *Ex parte Young*'s "straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 2047.

over submerged lands . . . it simply cannot be said that the suit is not a suit against the State." *Id.* at 2047.

The Wisconsin defendants suggest that *Coeur d'Alene* controls here because Froebel's claims in this action also implicate the state's sovereign interest in its navigable waters. The court, however, does not find the comparison persuasive. The discrete remedial actions sought by the plaintiff in this case would not amount to the expansive and permanent incursion on sovereign interests indicated by the injunctive relief sought in *Coeur d'Alene*. Therefore, *Coeur d'Alene* also does not affect the plaintiff's recourse to *Ex parte Young* in this action.

c. Relevance of *Pennhurst* to this action

Based on the above analysis, it would appear that Meyer and Sturtevant are subject to suit under the *Young* exception to sovereign immunity. Before reaching that conclusion, however, I raise one more potential limitation on the application of the *Young* doctrine in this case, this time arising out of *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). *Pennhurst* essentially recast the rationale for *Young* as a matter of the supremacy of federal law rather than the "non-state" nature of *ultra vires* actions by state officers. *See Jackson*, 72 N.Y.U.L. Rev., *supra*, at 512. Under this rationale, prospective relief enjoining violations of state rather than federal law fell outside the scope of the *Young* exception to Eleventh Amendment immunity. Thus, *Pennhurst* held that citizens could not sue state officials in federal court for violations of state law, regardless of the relief sought. *Pennhurst* at 106.

Pennhurst involved a pendent state claim, which is not at issue here. This case obviously alleges violations of a federal statute, so it may seem unusual to invoke the *Pennhurst* rule in this context. However, plaintiff's first count alleges a failure to obtain a permit for the discharge of pollutants pursuant to 33 U.S.C. § 1342, the provision establishing a National Pollutant Discharge Elimination System ("NPDES"). Under § 1342(b) and (c), the Environmental Protection Agency ("EPA") may cede authority to devise and administer NPDES permits to state regulatory agencies, such as the DNR. Once a state permitting program is approved by the EPA, federal permitting authority under § 1342(a) is suspended. 33 U.S.C. § 1342(c)(1). Wisconsin's version of the NPDES permitting scheme, duly sanctioned by the EPA, is found at Wis. Stat. §§ 283.001-.95 and establishes a superceding Water Pollutant Discharge Elimination System ("WPDES"). *See* § 283.31, Wis. Stat. WPDES permits are issued, paradoxically given our present fact situation, by the Wisconsin DNR, the state's environmental regulatory agency.

Under the Act's federalist allocation of authority, the EPA and state regulatory agencies share concurrent enforcement authority over violations of state-issued permits. *See* 33 U.S.C. § 1319. Similarly, the discharge of pollutants *without* a permit is unlawful under both 33 U.S.C. § 1311(a) and Wis. Stat. § 283.31(1). However, Congress clearly intended the states to take the leading role in issuing and enforcing the NPDES system. *See, e.g., District of Columbia v. Schramm,* 631 F.2d 854, 863 (D.C.Cir. 1980) ("The state courts are the proper forums for resolving questions about state NPDES permits, which are, after all, questions of state law."); *and State of California v.*

United States Dep't of the Navy, 845 F.2d 222, 225 (9th Cir. 1988) (finding that, once approved, state programs are administered under state law). Thus, the question of whether a permitless discharge of pollutants by the DNR, such as plaintiff alleges, violates state or federal law for the purpose of applying *Pennhurst* is a potentially complicated question that touches on federal supremacy, institutional practice and agency discretion. These issues are addressed more fully in the following sections.

As a general principal, however, the court rejects the suggestion that state permitting authority divests federal courts of jurisdiction to hear citizen suit complaints alleging CWA violations by state officials. Although the effect of *Pennhurst* in this context appears unclear, other federal courts have entertained citizen actions alleging violations of the Act's permit provisions by state officers without addressing this question. *See, e.g., Natural Resources Defense Council v. California Dep't of Transp.*, 96 F.3d 420 (9th Cir. 1996); *Committee to Save Mokelumne River v. East Bay Util. Dist.*, 13 F.3d 305 (9th Cir. 1993); *Mancuso v. New York State Thruway Auth.*, 909 F. Supp. 133 (S.D.N.Y. 1995); *Pennsylvania Envtl. Defense Found. v. Mazurkiewicz*, 712 F. Supp. 1184 (M.D.Pa. 1989).

Accordingly, I find that *Pennhurst* does not bar the application of *Ex parte Young* to plaintiff's claim that Meyer and Sturtevant were required to obtain a state WPDES permit. Thus, the DNR officials are subject to suit on both counts under the *Young* exception to sovereign immunity.

B. Scope of Claim/Issue Preclusion

Meyer and Sturtevant argue that both counts must be dismissed against them under the doctrine of claim preclusion. The defendants' assertion of claim preclusion arises out of the administrative decision and order issued by ALJ Boldt and subsequently affirmed by a Wisconsin circuit court and the Wisconsin Court of Appeals.

1. Summary of State Administrative Proceedings and Judicial Review

The ALJ Decision, issued pursuant to Wis. Stat. § 227.47, followed a contested case hearing on the removal of Funk's Dam. The contested case hearing was granted on a petition filed by the District, challenging the DNR's decisions to remove the dam and not to obtain an EIS regarding the project. *Froebel* at *1. By the time of the hearing, Froebel intervened and the District withdrew, leaving the DNR and Froebel as the contesting parties. *Id.* Whatever may have been the initial focus of the District's challenge to the agency, the ALJ Decision identified the central issue at the hearing stage as "whether the Department's implementation of its decision to remove the Funk's dam was reasonable, necessary and appropriate based upon information foreseeable to the DNR at the time of dam removal." ALJ Decision, Findings at ¶ 11.

Petitioner Froebel specifically sought an order from ALJ Boldt, pursuant to Wis. Stat. § 30.03,[10] enjoining the

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[10] Section 30.03(2), Wis. Stat., authorizes the district attorney or the attorney general (if requested by the DNR) to

DNR to perform remedial actions with respect to Funk's Dam and sediment loading in the surrounding waters. ALJ Boldt determined that the cited provision "does not provide legal authority for the Division to Order specific remedial actions in this matter." ALJ Decision, Conclusions at ¶6. Although ALJ Boldt does not discuss the state permitting program for water pollutant discharge in any length or detail, the last paragraph of his decision states:

> The DNR in seeking the removal of the Funk's Dam was not "the owner or operator of a point source discharging Pollutants into the waters of the state" within the meaning of [Wis. Stat. § 283.37(1)]. No WPDES permit is necessary in connection with either removal of the dam or any continuing sediment transport emanating from the Funk's Dam.

ALJ Decision, Conclusions at ¶8.

Froebel appealed the administrative decision to state circuit court, challenging ALJ Boldt's legal conclusions (1) that Wisconsin law did not provide legal authority for an administrative law judge to order the DNR to perform specific remedial actions; and (2) that Wis. Stat. § 283.37(1)[11] did not require the DNR to obtain a WPDES

"abate any nuisance committed under this chapter." Section 30.03(4)(a), Wis. Stat., gives the DNR the authority to "request the hearing examiner to issue an order directing the responsible parties to perform or refrain from performing acts in order to fully protect the interests of the public in the navigable waters."

[11] The Wisconsin Statutes were renumbered while Froebel's appeal was pending in state courts. This opinion uses current section numbering throughout.

permit in connection with Funk's Dam. *Froebel v. Wisconsin Dep't of Natural Resources*, No. 96-CV-623, slip op. at 2 (Waukesha County Cir. Ct. Dec. 27, 1996) ("Cir. Ct. Decision"). The circuit court reviewed Froebel's legal challenges de novo. *Loomis v. Wisconsin Personnel Comm'n*, 179 Wis.2d 25, 30 (Ct. App. 1993). Affirming both legal conclusions, the court held that the remedial actions requested by Froebel "are not within the ALJ's power to order nor are they within the court's powers within the context of a Chapter 227 review."[12] Cir. Ct. Decision at 8. Although the circuit court accepted ALJ Boldt's factual finding that the Oconomowoc River and North Lake had been harmed by the dam removal, it opined: "Petitioner is in the wrong forum and this court is without power or jurisdiction to grant the relief requested." Cir. Ct. Decision at 9, 4.

Froebel appealed to the Wisconsin Court of Appeals, which considered the same legal questions, again under a de novo standard. The court of appeals affirmed, devoting much of its analysis to the statutory authority of the ALJ and the reviewing court: "The primary issue in this case is whether the DNR may be ordered, by either the ALJ or the circuit court, to take specific remedial actions

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[12] Chapter 227 is Wisconsin's codification of administrative procedure and review. Wis. Stat. § 227.57 establishes the scope of review of a decision by an agency hearing examiner or administrative law judge. In general, the reviewing court is confined to the administrative record, it must find a specific ground for modifying or setting aside an agency order, and it should not substitute its judgment for that of the ALJ on discretionary matters. *See Barnes v. Wisconsin Dep't of Natural Resources*, 184 Wis.2d 645, 661-62 (1994).

based on findings made in the context of an administrative hearing under ch. 227, Stats." *Froebel*, at *3. The appellate court discussed and rejected each statutory authority to enjoin the DNR asserted by petitioner.[13]

On the issue of whether the DNR was required to obtain a WPDES permit for the removal of Funk's Dam, the court of appeals emphasized the importance of Wis. Stat. § 31.187, a section which Meyer and Sturtevant continue to stress in today's litigation. Section 31.187 states: "The department may remove or cause to be removed, in such manner as it deems fit, old and abandoned dams in streams in this state, upon giving 60 days' notice in writing to the owner thereof, if he can be found." Wis. Stat. § 31.187(1). According to the court of appeals, this provision governs dam removal by the DNR to the virtual exclusion of other Wisconsin statutory provisions, including Wis. Stat. § 283.31(1), setting forth the basic terms and conditions of the WPDES permitting scheme. *See Froebel*, at *6. The court identified the following reasons for this conclusion: (1) Sturtevant and another DNR official testified before the ALJ that the DNR does not require a WPDES permit for dam removal; (2) Wis. Stat. § 31.185, which requires private parties to obtain a permit before removing a dam, is the only relevant permit provision and does not apply to the DNR;[14]

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[13] These were, variously, Wis. Stat. § 30.03(4)(A), § 227.57(5), § 227.57(8), and § 227.57(9).

[14] As a prerequisite to the granting of a permit under this section, the DNR may require applicants "to comply with such conditions as it deems reasonably necessary in the particular case to preserve public rights in navigable waters, to promote safety, and to protect life, health and property." Wis. Stat. § 31.185(5).

and (3) Wis. Stat. § 283.31(1) does not specifically mention dam removal or its potential consequences and thus is trumped by § 31.187(1) under the rules of statutory construction. *Id.*

Finally, the court of appeals had this to say about the DNR's actions in connection with Funk's Dam:

> We join in the ALJ's criticism's of the DNR's practices in this case. We would expect the DNR, as the protector of this state's natural resources and the chief enforcer of our laws protecting those assets, to abide by the rules which it imposes and enforces on others. We would also expect it to abide by the promises and representations it makes to the public regarding its own activities. . . . However, we cannot rewrite the existing laws to accommodate Froebel's legitimate complaints.

Froebel, at *6-7.

2. Claim Preclusion

Under the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, a federal court must afford a state court judgment "the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). *See also* 28 U.S.C. § 1738. Thus, Wisconsin law governs my assessment of the claim preclusive effect of the administrative decision and review in this matter. *Starzenski v. City of Elkhart*, 87 F.3d 872, 877 (7th Cir. 1996). In Wisconsin, "a final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which

were litigated or which might have been litigated in the former proceedings." *Northern States Power Co. v. Bugher*, 189 Wis.2d 541, 550 (1995). The following factors must be present in order for prior proceedings to bar a subsequent claim: (1) an identity between the parties or their privies in the prior and subsequent suits; (2) an identity between the causes of action in the two suits; and (3) a final judgment on the merits in a court of competent jurisdiction. *Id.* at 551.

The present facts clearly satisfy the first and third factors. Meyer and Sturtevant are, for the purposes of party identity, indistinguishable from the DNR, *see id.* at 551-52; and two levels of Wisconsin courts have rendered final judgments on the legal merits of Froebel's claims. Although these were appeals of an administrative decision, the reviewing courts addressed legal questions de novo, and, in any event, the ALJ Decision itself may carry preclusive effect, *see Acharya v. American Fed'n of State, County & Mun. Employees*, 146 Wis.2d 693, 697 (Ct. App. 1988); *and Patzer v. Board of Regents of the Univ. of Wis. Sys.*, 763 F.2d 851, 858 (7th Cir. 1985) ("In general, a judgment affirming an administrative decision is res judicata as to the claims adjudicated, no less than a judgment entered after a trial on the merits.")

A more difficult call is the second factor – identity between causes of action. Wisconsin follows a transactional approach to determining whether two suits involve the same cause of action. *DePratt v. West Bend Mut. Ins. Co.*, 113 Wis.2d 306, 311 (1983). Under the transactional view of the dimensions of a cause of action, drawn from the Restatement (Second) of Judgments, courts generally view claims in factual terms, "regardless of the number of

substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff." Restatement (Second) of Judgments § 24 cmt. a (1982). The factual basis for plaintiff's claims in this forum is clearly the same as that in the state administrative proceedings; indeed, the plaintiff incorporates ALJ Boldt's factual determinations by reference in his complaint.

However, courts recognize certain exceptions to the rule of claim preclusion. The Restatement (Second) of Judgments § 26 compiles a number of these exceptions, one of which appears relevant to the facts at hand. The transactional approach to determining identity of claims will not extinguish a subsequent cause of action if

> [t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief.

Restatement (Second) of Judgments § 26(c) (1982). *See also Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373, 382 (1985). As the comment to § 26(c) explains, the transactional claim preclusion rule is predicated on the assumption that the forum in which the first judgment is rendered put no barriers in the way of the plaintiff presenting his entire claim, including any demands for relief available to him under applicable law. When

such barriers exist and worked against the plaintiff, to preclude him from a second action would be fundamentally unfair. Restatement (Second) of Judgments § 26 cmt. c (1982).

Wisconsin state courts can exert jurisdiction over a citizen suit under the Clean Water Act and order necessary injunctive relief, even against the DNR. *See, e.g., Kerns v. Dukes*, 707 A.2d 363, 368-69 (Del. 1998) (finding state court jurisdiction over CWA citizen suit against members of Delaware Department of Natural Resources). But the same cannot be said for the state division of hearings and appeals, the administrative forum to which Froebel's initial claims were addressed. The authority and power of a state administrative agency is created by statute and defined solely by the legislature. *Jocz v. Labor & Indus. Review Comm'n*, 196 Wis.2d 273, 292 (Ct. App. 1995). The unequivocal conclusion of the administrative decision in this matter, as well as the Wisconsin reviewing courts, was that ALJ Boldt did not have the statutory authority to enjoin the DNR to perform remedial actions. In addition, the circuit court and the Wisconsin court of appeals concluded that state courts, when reviewing an appeal of an administrative decision, are likewise constrained by statute. Section 227.57, Wis. Stat., sets out the scope of judicial review of agency decisions. Froebel asserted no fewer than three provisions of § 227.57 as potential statutory bases to order injunctive relief against the DNR. Each one was rejected. While each tribunal acknowledged the merits of Froebel's underlying claim for relief, his central request for relief was barred because none of the courts had the authority to grant it.

In this respect, I find the plaintiff's predicament distinguishable from, for example, that of the petitioner in *Northern States Power Co. v. Bugher*, 189 Wis.2d 541 (1995). The question in that case was whether Northern States Power Company ("Northern") was barred by claim preclusion from pursuing its 42 U.S.C. § 1983 claim relating to the constitutionality of a state tax because it had already challenged its tax liability under the questioned provision before the Wisconsin Tax Appeals Commission, and then appealed an unfavorable decision there to state courts. The Wisconsin Supreme Court held that claim preclusion operated to bar further litigation under § 1983, although the issue of constitutionality had not been raised in the prior administrative proceedings. *Id.* at 545. Although in its § 1983 action Northern sought an order enjoining the Department of Revenue "from collecting the unconstitutional taxes," the company's underlying claim remained its own entitlement to a tax deduction. *Id.* at 547, 554. "Throughout the entire proceedings, Northern sought the same relief – a deduction from payment of its franchise taxes, based on the same incident – the DOR's determination that Northern was not entitled to the deduction." *Id.* at 555. Unlike the state administrative forum adjudicating Froebel's claims for relief in this case, the Tax Appeals Commission was presumably fully able to grant the deduction from tax liability sought by petitioner in *Northern States*, had the Commission found the deduction warranted on the merits.

The essence of the remedy sought by Froebel has always been and remains injunctive relief. In addition, the essence of the right granted by the CWA's citizen suit

provision is the individual's ability to enjoin non-compliant parties to abide by the strictures of the Act. The court finds that it would be "fundamentally unfair" to eviscerate this federal right of action because of prior state proceedings that could not have granted the requested remedy under any circumstances. Therefore, the doctrine of claim preclusion does not bar Froebel's claims against Meyer and Sturtevant. *See also Brye v. Brakebush,* 32 F.3d 1179, 1185 (7th Cir. 1994) ("Wisconsin law does not treat *res judicata* as an iron clad rule which must be implacably applied whenever its literal requirements are met, regardless of any countervailing considerations.")

3. Issue Preclusion

My analysis of the preclusive effect of the ALJ Decision and judicial review does not end with a discussion of claim preclusion, however. The doctrine of issue preclusion also prevents relitigation of an issue of fact or law previously determined by a valid final judgment in an action between the same parties. *Allen v. McCurry,* 449 U.S. 90, 94 (1980); *Heggy v. Grutzner,* 156 Wis.2d 186, 192 (Ct. App. 1990). A party who was not involved in the prior action may also assert issue preclusion offensively, in order to prevent relitigation of an issue conclusively resolved against another party. *Id.* at 193. Thus, both Meyer and Sturtevant as well as Waukesha County, which was not involved in the state administrative proceedings and review, may potentially assert issue preclusion arising from the ALJ Decision and judicial review.

The factual findings of ALJ Boldt do not appear disputed and are accepted as true at this stage, as they

form part of the pleadings. Much of the legal analysis and conclusions of the administrative law judge and the reviewing courts concerned their own statutory authority to enjoin the DNR, which is not relevant to the plaintiff's substantive claims under the Clean Water Act. However, one paragraph of ALJ Boldt's Conclusions of Law, later affirmed in both the Wisconsin circuit court and court of appeals decisions, appears directly pertinent to today's litigation. Specifically, the administrative law judge found as a matter of law that the DNR, in connection with Funk's Dam, was not the owner or operator of a point source discharging pollutants into the navigable waters of the state. *See* ALJ Decision, Conclusions at ¶ 8. More expansively, ALJ Boldt held that "[n]o WPDES permit is necessary in connection with either removal of the dam or any continuing sediment transport emanating from the Funk's Dam." *Id.* As with claim preclusion, in determining the issue preclusive effect of this holding the court defers to Wisconsin law. *Starzenski* at 877.

Wisconsin courts cite the Restatement (Second) of Judgments §§ 27 and 28 as authority on the general rule of issue preclusion and exceptions to that rule. *See, e.g., Michelle T. v. Crozier,* 173 Wis.2d 681 (1993). The Restatement frames the general rule as follows:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement (Second) of Judgments § 27 (1982). The rule itself suggests at least three implicit limitations on the

issue preclusion doctrine: (1) that the issue in question was "actually litigated" in the first proceeding; (2) that the issue was decided by "a valid and final judgment"; and (3) that determination of the issue was "essential to the judgment."

Based on the procedural history of Froebel's claims, I find that the first and second limitations do not apply to this case. The issue of whether the DNR needed to obtain a WPDES permit for the removal of Funk's Dam was both "actually litigated" and subject to "a valid and final judgment" in state courts. In Froebel's appeals to both state circuit court and the court of appeals he explicitly requested review of ALJ Boldt's determination that dam removal by the DNR did not require a WPDES permit under Wis. Stat. §§ 283.37(1) and 283.31(1). *See* Cir. Ct. Decision at 2; *Froebel* at *1. Both courts addressed and decided the issue. *See* Cir. Ct. Decision at 8; *Froebel*, at *8. "When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of [the issue preclusion rule]." Restatement (Second) of Judgments § 27 cmt. d (1982). *See also Continental Can Co. v. Marshall*, 603 F.2d 590, 596 (7th Cir. 1979). There is also no question that the ALJ Decision as affirmed by Wisconsin courts represents a valid and final judgment. *See* Restatement (Second) of Judgments § 13 cmt. g (1982).

Froebel argues that this issue has not been resolved at the administrative or state court level in a manner that can be considered a "final judgment" for preclusive purposes because the administrative law judge found that he lacked authority to order the requested relief. While the scope of ALJ Boldt's remedial authority does not affect

the finality of the judgment as the plaintiff suggests, the real concern being raised by this argument is that the WPDES issue was not "essential to the judgment" in the administrative proceedings and review. The court finds some merit to this argument. The substantial portion of all three state decisions discuss the statutory authority of the administrative law judge and the reviewing courts with respect to injunctive relief. At each level, it does appear that the primary ground for rejecting Froebel's claims was the court's conclusion that its hands were tied. Thus, the legal conclusion that Wisconsin law does not require the DNR to obtain a WPDES permit for dam removal was in some sense tangential to the central holding that "[p]etitioner is in the wrong forum and this court is without power or jurisdiction to grant the relief requested." Cir. Ct. Decision at 4.

The "essential to the judgment" requirement for issue preclusion assumes that a nonessential determination is less likely to inspire close judicial attention or aggressive litigation by parties. *See* 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4421 (1981). Under these circumstances, extending the determination to an entirely different proceeding is deemed risky and potentially unfair. On the other hand, an essential finding does not have to be so crucial that without it a judgment could not stand. "Rather, the purpose of the requirement is to prevent the incidental or collateral determination of a nonessential issue from precluding consideration of that issue in later litigation." *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1571 (Fed. Cir. 1983).

Given the history of this case, the conclusion that the DNR is beyond permit requirements, while perhaps not

necessary to sustain the administrative and state court decisions, cannot be said to be "incidental" or "collateral" to the heart of this litigation. Fundamentally, the plaintiff challenges the scope of DNR discretion when the agency acts in a non-enforcement capacity. Thus, the state courts' resounding conclusion that the WPDES permitting process does not encroach on that discretion hardly seems tangential. At least, the resolution of the WPDES issue was an alternate ground, which also may have denied Froebel his requested relief. Alternative holdings affirmed on appeal generally carry issue preclusive effect because appellate review suggests the issue has in fact received careful judicial consideration. *See County of Cook v. Lynch*, 648 F. Supp. 738, 740-41 (N.D.Ill. 1986) (citing Restatement (Second) of Judgments § 27 cmt. o (1982)). In the present case, then, I acknowledge that the WPDES permit requirement received sufficient judicial attention and was adequately contested by the parties in the prior proceedings, effectively satisfying the concerns of the final requirement for issue preclusion. I also conclude that, although Wisconsin courts follow a "fundamental fairness" approach to issue preclusion, none of the accepted equitable factors apply to the instant situation. *See Michelle T.*, 173 Wis.2d at 688-90 (paraphrasing exceptions to the general rule of issue preclusion in the Restatement (Second) of Judgments § 28 (1982)).

Numerous cases have also held that prior state decisions concerning state-issued NPDES permits *do* carry preclusive effect in subsequent federal actions. *See, e.g., United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir.

1980). In *ITT Rayonier*, the EPA brought a federal enforcement action challenging the meaning of a footnote pertaining to discharge standards in a state-issued permit, previously interpreted in a state enforcement action. The Ninth Circuit found that the EPA was bound by the state court's determination on the meaning of the footnote. The court concluded that the existence of concurrent enforcement powers did not negate preclusion principles, as the CWA "manifests no countervailing policy reasons to abrogate the doctrine known generically as res judicata." *Id.* at 1001-02. Froebel argues that *ITT Rayonier* and other cases are distinguishable from his citizen suit precisely because they involve successive enforcement actions by state and then federal courts under the CWA's notoriously ambiguous concurrent enforcement regime. *See* 33 U.S.C. §§ 1319, 1342(i), 1365; *see also generally* David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd when Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 Md. L. Rev. 1552, 1577 (1995). However, the significance of this distinction is not apparent to the court. If anything, a defendant's assertion of issue preclusion is stronger in the context of successive citizen enforcement actions *by the same plaintiff*.

Froebel also argues that the statutory language and history of the CWA citizen suit provision reflect just such a "countervailing policy," warranting an exception to the normal rules of preclusion. He meaningfully cites the authorization and jurisdiction language in § 1365(a) as a congressional mandate that preclusion rules may never bar citizen suits under the Act. Section 1365 begins "*Except as provided* in subsection (b) of this section, any

citizen may commence a civil suit on his own behalf . . . " 33 U.S.C. § 1365(a) (emphasis added). Subsection (b) pertains to notice requirements. Citizen plaintiffs must notify the EPA, the state regulatory agency and the alleged violator no less than sixty days prior to filing; if either the EPA or the state commences an enforcement action within those sixty days, the plaintiff is barred from filing, although he may intervene in the government action as a matter of right. 33 U.S.C. § 1365(b)(1).

The citizen suit notice requirements are genuine hurdles the plaintiff must clear before citizen actions are even authorized to commence under the Act. Similarly, the "Except as provided . . . " language in § 1365(a) *authorizes* citizen suits and is jurisdictional in nature. I find no evidence that § 1365(a) was meant to dispose of every potential obstacle that may, as a practical matter, foreclose litigation on the merits of a citizen claim. Claim and issue preclusion are not jurisdictional bars but affirmative defenses which may be raised by litigants after a case is filed, usually on a summary judgment motion or a motion for judgment on the pleadings. *See, e.g., D & K Properties Crystal Lake v. Mutual Life Ins. Co. of N.Y.*, 112 F.3d 257, 259 n.1 (7th Cir. 1997).[15] Put another way, by

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[15] In this case, defendants raise preclusion in a Rule 12(b)(6) motion to dismiss. However, as both parties appended the necessary administrative and state court decisions to their initial filings in this matter and no additional material appears necessary to adjudge the preclusive effect of the prior proceedings, I will construe the assertion of preclusion as a Rule 12(c) motion for judgment on the pleadings, to the extent of the issue precluded. *See* Fed. R. Civ. P. 8(c) and 12(c).

finding that issue preclusion attaches to the prior determination of the WPDES issue, I am not preventing the commencement of Froebel's citizen suit under § 1365(a), but adjudicating one of his claims. Therefore, I find plaintiff's argument for an exception to normal preclusion doctrine based on § 1365(a) unpersuasive.

Based on the preceding analysis, Froebel is precluded from relitigating the WPDES permit issue. However, I limit the scope of the precluded issue to the core legal conclusion reached by the Wisconsin courts and supported by the courts' analyses – namely, that the actual removal of the dam by the DNR did not necessitate a permit. Only the ALJ Decision alludes to "continuing sediment discharge emanating from the Funk's Dam." ALJ Decision, Conclusions at ¶8. ALJ Boldt's analysis, however, does not discuss the ramifications of ongoing discharge in any respect, but focuses exclusively on the reasonableness of the DNR's decision to remove the dam and on his own statutory authority. Similarly, the discussions by the circuit court and the court of appeals pertaining to the WPDES issue analyze only the interaction of the permit statutes and Wis. Stat. § 31.187(1) in governing dam removal by the DNR. As it happens, this court does not agree with the state courts' conclusion about the comparative weight of these provisions,[16] but because of

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[16] The Wisconsin defendants echo the logic of the state decisions in arguing that Wis. Stat. § 31.187(1) – granting the DNR authority to remove abandoned dams "in such manner as it deems fit" – essentially trumps the substantive state and federal law on water pollution discharge permits. I disagree with this logic both as a matter of statutory construction and on federal supremacy grounds.

issue preclusion doctrine I will give preclusive effect to the narrowest holding I believe was reached by the

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The Wisconsin defendants and the state courts characterize § 31.187(1) as the more "specific" provision, which therefore prevails over the more "general" statutory prohibition against permitless pollutant discharge. *See, e.g., Froebel,* at *6. I could just as reasonably characterize the detailed provisions relating to the terms and conditions of WPDES permits, *see* Wis. Stat. § 283.31, as more "specific" than the "general" discretionary authority granted by § 31.187. But the real issue here is an implicit conflict between state and federal law. Section 283.31, Wis. Stat., is an analogue of the core provision of the CWA, 33 U.S.C. § 1311, which flatly prohibits the discharge of any pollutant from a point source into navigable waters without the appropriate permit, as a matter of federal law. State law, on the other hand, grants the DNR wide discretion to remove old and abandoned dams without a permit. Wis. Stat. § 31.187. Federal preemption doctrine, grounded in the Supremacy Clause, provides that in any conflict between state and federal law, federal law prevails. *See* U.S. Const. art. VI, § 2. One of the lesser ramifications of this doctrine is that "a state statute is void to the extent that it actually conflicts with a valid federal statute." *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 158 (1978). It seems to me, therefore, a straightforward proposition that while the DNR has discretion under Wisconsin law to remove abandoned dams, it may not do so in contravention of federal water pollution discharge requirements.

Inarguably, Congress intended states to play the leading role in administering and enforcing the NPDES permit programs. 33 U.S.C. § 1251(b); *see also District of Columbia v. Schramm,* 631 F.2d 854, 860 (D.C. Cir. 1980) (citing legislative history reflecting congressional desire to "put the maximum responsibility for the permit process in the States"). Further, § 1370 of the Act makes clear that states are free to adopt and enforce limitations on the discharge of pollutants *more stringent* than those established by the Act. 33 U.S.C. § 1370. But the importance of states as the prime CWA enforcers and regulatory draftsmen does not disturb the Act's strict liability credo with

reviewing courts – that the dam removal project itself, when undertaken by the DNR, did not require a WPDES permit. Whether Meyer and Sturtevant or Waukesha County have been obligated *since dam removal* to obtain a permit in connection with the alleged ongoing sediment discharge from the partially removed dam remains a viable question in this action and is addressed in the following sections.

C. Discussion of Plaintiff's Claims

Froebel alleges that the transfer or redeposit of indigenous sediment through Funk's Dam, which has been continuous since the faulty removal of the dam in 1992, is a discharge of pollutants within the meaning of the § 1311 of the Act. 33 U.S.C. § 1311(a). Section 1311 makes the discharge of any pollutant unlawful except in compliance with enumerated provisions. *Id.* Froebel contends that the sediment transfer at issue was subject to two of these provisions – § 1342 and § 1344 – each of which provides for the issuance of permits to regulate pollutant discharge in certain fact situations. The plaintiff alleges that defendants were required to obtain a permit with respect to

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respect to state actors – if they, like any person under the Act, engage in the discharge of pollutants without a permit.

The distinction between agency enforcement and non-enforcement actions is crucial in this context: "[N]one of [the enforcement] provisions contains any mechanism for relief against the state itself except to the extent that the state is an actual discharger of pollutants in violation of the act." *Ringbolt Farms Homeowners Ass'n v. Town of Hull*, 714 F. Supp. 1246, 1253 (D.Mass. 1989).

Funk's Dam under each of these provisions but failed to do so, thereby violating the Act.

This decision, like many which consider the existence of an unlawful pollutant discharge under § 1311, discusses the applicability of the identified permitting provisions to the facts of this case. In practice, a finding that defendants were legally not required to obtain the asserted permits is also a finding that an unlawful discharge of pollutants under § 1311 has not in fact occurred.[17]

1. Count I – Discharge of Pollutants Without a § 402 Permit

Section 1342 establishes the NPDES permit program, largely administered by the states. 33 U.S.C. § 1342. Under federal law, NPDES permits (also "§ 402 permits," referencing the public law number) are required for any given set of circumstances if five elements are present: "(1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) a *point source*." *National Wildlife Fed'n v.*

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[17] I could reach the same conclusion by organizing my analysis around § 1311, rather than the permitting provisions. For example, the rest of this decision could be reframed as follows: (1) a discharge of pollutants under § 1311 must involve an "addition"; (2) an "addition" occurs when a point source introduces pollutants from the outside world; (3) redeposited sediment constitutes an "addition" in only certain limited circumstances; (4) those circumstances do not apply to this case; (5) therefore there is no discharge of pollutants under § 1311.

Consumers Power Co., 862 F.2d 580, 583 (6th Cir. 1988). The parties dispute the presence or applicability of two of these elements to the facts surrounding Funk's Dam. The DNR officials and Waukesha County argue (1) that the partially removed dam is not a *point source* under the Act, and (2) that nothing has been *added* to the waters of the Oconomowoc River and North Lake since dam removal.

a. The point source requirement

The CWA defines a point source as "any discernible, confined and discrete conveyance, including *but not limited* to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). Dams are not specifically mentioned in this definition. However, cases considering the application of § 402 permit requirements to dams have not categorically exempted dams from the point source definition. *See Mokelumne River*, 13 F.3d at 308; *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982) ("The parties agree that a dam can, in some circumstances, be a "point source."). Whether or not a dam qualifies as a point source appears to turn on the existence of the other disputed element in this case – an *addition* of pollutants to the water. *See Consumers Power* at 586. Thus, the two elements essentially devolve into one in the context of this case. Accordingly, a discussion of the second requirement is dispositive of both.

b. The addition requirement

The requirement that pollutants be added to the water from a point source derives from § 1362, which defines the "discharge of a pollutant" in part as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The Act does not further define "addition." Among various kinds of potential point sources, dams present a unique problem because water, polluted and unpolluted, flows both into and out of dams. *Gorsuch*, 693 F.2d 156, remains the leading case on the applicability of the § 402 permit programs to dams. The sole issue before the Court of Appeals for the District of Columbia Circuit in *Gorsuch* was whether certain dam-induced water quality changes – among them "sediment release" – constitute a "discharge of a pollutant" as defined in § 1362(12) of the Act. *Id.* at 161.

The plaintiff in *Gorsuch*, National Wildlife Federation, sought an injunction ordering the EPA Administrator to require NPDES permits for all dams as a nondiscretionary matter. *Id.* The plaintiff argued broadly that any dam-induced change in water quality involves a "pollutant" and that release of polluted water through a dam into downstream waters constitutes an "addition" of a pollutant from a point source, requiring a § 402 permit. *Id.* at 165. The EPA argued for a narrower reading of § 1362(12), which would require § 402 permits for dams only in certain circumstances. The District of Columbia Circuit upheld the EPA's interpretation of the relevant terms, finding it reasonable and consistent with legislative intent, and therefore entitled to great deference. *Id.* at 183.

The EPA's position was that an "addition" of pollutants from a point source within the meaning of § 1362(12) "occurs only if the point source itself physically introduces a pollutant into water from the outside world." *Id.* at 174-75. In keeping with this interpretation, the EPA has required § 402 permits where a dam pipe or spillway releases oil or sanitary wastes into water passing through the dam outlet works, and where a dam constructed for the treatment of municipal wastes discharges those wastes into the water. *Consumers Power* at 586. Similarly, the Ninth Circuit held that a NPDES permit was required where a dam structure collected polluted surface runoff from an abandoned mine site and channeled it into the dam reservoir. *Mokelumne River* at 308. Also following the EPA's interpretation of "addition" to, perhaps, an unnecessary conclusion, the Sixth Circuit held in *Consumers Power* that a hydroelectric facility's release of dead fish was *not* an addition of a pollutant requiring a § 402 permit because the fish were already in the water (albeit alive) before being killed in the dam's own power generating turbines. *Consumers Power* at 581.

Froebel's claim that the movement of indigenous sediment through Funk's Dam constitutes a "discharge of a pollutant" requiring a § 402 permit clearly fails given the EPA's interpretation of "addition," ratified in *Gorsuch*. The upstream silt and sediment now redeposited in the downstream waters of the river and lake were not "introduced" into water from the "outside world" by the operation or partial removal of the dam. *Gorsuch* at 174-75. Froebel attempts to escape this obvious point in the following manner.

First, he tries to distinguish *Gorsuch* and other cases cited by defendants by arguing that these cases involve operational dam systems, not abandoned, unsafe dams which have been partially breached. He suggests, in effect, that the EPA's interpretation of "addition" in *Gorsuch* merely reflects a special policy exemption for working dams that has no application in the context of an abandoned mill dam.[18] But the "addition" requirement – that a point source must physically introduce pollutants into the water from the outside world – is not explicitly, or even logically, limited to dams by *Gorsuch* and *Consumers Power*. *See, e.g., Consumers Power* at 583 (stating that all five elements must be present in "any given set of circumstances" for NPDES permit requirements to apply). Thus, even if the plaintiff believes that Funk's Dam, in its present condition, should not be considered a dam for NPDES purposes, he must still show that an

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[18] While both parties refer to a de facto "exemption" for dams from NPDES permit requirements under the Act, the leading cases differ in their assessment of congressional intent on this issue. *See, e.g., Gorsuch* at 173 ("[W]hile Congress did not specifically exclude dams from the NPDES program, it expressed [no] specific intent to include them . . . "); *but see Consumers Power* at 587 ("EPA's construction of the statutory term "addition" is, in our view, rooted in the general congressional policy that NPDES permits are not required for dam-caused pollution."). In any event, the dam "exemption" – if it exists and whether or not of conscious design – is limited and not inconsistent with the understanding of "addition" in other contexts under the NPDES scheme. As with a pipe or other prototypical point source, if the dam itself adds pollutants to the water, rather than merely transmitting the water coming into it in whatever form, then it will be subject to the NPDES permit system. *Id.* at 586.

"addition" of a pollutant from a point source, under § 1362(12), occurred in order to establish the need for a § 402 permit.

Next, having rejected the EPA's interpretation of "addition" in *Gorsuch*, Froebel argues that this court should apply an interpretation of "addition" that expressly encompasses the redeposit of sediment. To support this argument, he cites a number of cases, all of which I find distinguishable. As one example, the plaintiff cites *United States v. Sinclair Oil Co.*, 767 F. Supp. 200 (D.Mont. 1990), which identified "an emerging consensus in the Circuit Courts that a redeposit of indigenous materials into the waters of the United States qualifies as an "addition" of pollutants to these waters, *for purposes of enforcing the Clean Water Act.*" *Id.* at 204 (emphasis added). But *Sinclair Oil*, like the other cases relied on by Froebel, does not interpret "addition" in the context of § 402 permit requirements. Rather, *Sinclair Oil* involves the applicability of CWA enforcement provisions to defendant's failure to obtain a required dredging permit under § 1344 – or a § *404* permit.

The substitution is understandable given the confusing organizational structure of the Act. To recap, the gateway to the CWA's regulatory maze is § 1311, which makes the "discharge of any pollutant" unlawful except in compliance with certain other provisions, including § 1342 and § 1344. Section § 1342 establishes the NPDES or § 402 permit system to regulate, again, the "discharge of any pollutant." 33 U.S.C. § 1342(a)(1). Section § 1344 establishes the separate § 404 permit system to regulate the "discharge of dredged or fill material." 33 U.S.C. § 1344(a). The obvious logic of this organization is that a

§ 1344 discharge of dredged or fill material is, like a § 1342 discharge, presumed to be a generic discharge of pollutants under § 1311. Were this not the case, failure to obtain a required dredging permit under § 1344 would not constitute a violation of § 1311, which in turn triggers much of the enforcement authority in the Act, including citizen suit jurisdiction. *See, e.g.*, 33 U.S.C. § 1319 and § 1365.

The final complicating factor is that § 1362, as we have seen, defines the "discharge of a pollutant" for the entire Act as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Because plaintiffs must often establish that a discharge of dredged or fill material is a discharge of pollutants under § 1311, a line of cases has emerged applying the § 1362(12) definition of pollutant discharge, including the concept of "addition," to facts involving the discharge of dredged material. In this context, courts have held that dredged material – almost by definition redeposited sediment, *see Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 924 n.43 (5th Cir. 1983) – constitutes an "addition" for the purpose of finding a violation of § 1311's prohibition on pollutant discharge, thereby triggering enforcement authority.

With that said, I do not believe the cases cited by plaintiff stand for the proposition that redeposited sediment also constitutes an "addition" within the meaning of pollutant discharge under § 1342, or under the NPDES permit scheme. For example, in *Avoyelles* the defendants engaged in landclearing activities and large-scale deforestation using bulldozers without obtaining a § 404 dredging permit. *Id.* at 901. The Fifth Circuit held that

vegetation and other material redeposited during the clearing process was an "addition" such that a discharge of pollutants had occurred, violating § 1311 of the Act. *Id.* at 922. In the same vein, plaintiff also cites *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1505-06 (11th Cir. 1985) (finding that uprooting and redeposit of sea grass and sediment by defendant's tugboat propellers was an "addition" such that the CWA's prohibition on pollutant discharge was violated); and *Rybachek v. United States Envtl. Protection Agency*, 904 F.2d 1276, 1285 (9th Cir. 1990) (finding that placer mining in waterbeds, which involves excavating sediment and running it through a sluicing process that releases water with high concentrations of suspended toxic metals back into the river or stream, caused an "addition" such that a discharge of pollutants had occurred, subject to CWA regulation).

In sum, Froebel has not produced a case in which redeposited sediment is specifically held to be subject to § 402 permit requirements. But even if the above cases so held, I find the present facts distinguishable. The above cases all involve the active dredging of waterbeds and the related redeposit of dredged material. Accordingly, the defendants' activities in these cases are more appropriately covered by the § 404 permit process. The discussion of Count II in the following section makes clear why § 404 permit requirements do not attach to an ongoing redeposit of sediment such as the plaintiff alleges in this case.

Based on the preceding analysis, the EPA's interpretation of "addition" in the dam context remains more

pertinent to this set of facts than the broader interpretation urged by plaintiff. Consequently, the continuing sediment transfer through Funk's Dam cannot be considered an "addition" of a pollutant from a point source, requiring a § 402 permit. In asserting defendants' failure to obtain an NPDES permit in connection with the dam, Froebel has failed to state a claim upon which relief can be granted under §§ 1311 and 1342 of the Act. Fed. R. Civ. P. 12(b)(6). Defendants' 12(b)(6) motions to dismiss Count I are therefore granted.

2. Count II – Discharge of Pollutants Without a § 404 Permit

Section § 1344 of the Act authorizes the United States Army Corps of Engineers ("Corps") to issue § 404 permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344. Regulations issued by the Corps, found at 33 C.F.R. § 323.2, define "discharge of dredged material" and other relevant terms in this provision. *See* 33 C.F.R. § 323.2(d). However, the § 323.2(d) definition of "discharge of dredged material" has been altered and realtered since the removal of Funk's Dam, most recently by a District of Columbia Circuit decision that affirms a lower court injunction prohibiting EPA enforcement of the so-called "Tulloch rule." *See National Mining Ass'n v. United States Army Corps of Eng'rs*, ___ F.3d ___, 1998 WL 321064 (D.C. Cir. June 19, 1998). As a preliminary matter, then, I should make clear which set of regulations I apply to the facts of this case, and why.

a. Applicability of the Tulloch rule

In 1986, the Corps issued a regulation defining the term "discharge of dredged material" as "any addition of dredged material into the waters of the United States," but expressly excluded from this definition "*de minimis*, incidental soil movement occurring during normal dredging operations." *See National Mining Ass'n* at *1. In 1993, in response to litigation concerning the applicability of § 404 permits to wetland drainage activities, the Corps amended the definition, expanding its scope and eliminating the *de minimis* exception. *Id.* at *1-2. The 1993 regulation reads, in relevant part:

> [T]he term *discharge of dredged material* means any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States. The term includes, but is not limited to . . .
>
> . . .
>
> (iii) any addition, including any redeposit, of dredged material, including excavated material . . . which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

33 C.F.R. § 323.2(d) (1993) (amending 51 Fed. Reg. 41,232 (1986)).

Various trade associations engaged in dredging operations mounted a facial challenge to the 1993 amended regulation. The challenge was successful, and the United States District Court for the District of Columbia entered an injunction on Jan. 23, 1997, prohibiting the Corps and the EPA from enforcing the regulation, also called the

"Tulloch rule" in reference to a party in the wetlands litigation. *See American Mining Congress v. United States Army Corps of Eng'rs*, 951 F. Supp. 267 (D.D.C. 1997). The District of Columbia Circuit stayed the injunction pending appeal. The recent Court of Appeals decision in *National Mining Ass'n* affirms the district court decision and lifts the stay on the injunction, thereby invalidating and precluding enforcement of the Tulloch rule as of June 19, 1998. *National Mining Ass'n* at *1. Based on this chronology, from Sept. 24, 1993 – when the amended § 323.2(d) became effective, *see* 58 Fed. Reg. 48,424 (1993) – to June 19, 1998, the Tulloch rule's expanded definition of "discharge of dredged material" was subject to enforcement and legally binding on the parties.

Meyer and Sturtevant note, however, that the district court injunction was not stayed by the District of Columbia Circuit until June 25, 1997, although no authority is provided for this fact. *See* State Def.'s Br. in Supp. of Mot. to Dismiss at 29 n. 13. Assuming the defendants' information is correct, the injunction had effect from Jan. 23, 1997 to June 25, 1997. Froebel filed this action on June 6, 1997, arguably during a period when enforcement of the Tulloch rule was legally stayed and the 1986 regulations were binding. Meyer and Sturtevant argue that the Tulloch rule is not relevant to these proceedings for other reasons, as well. The regulations were not amended until 1993, meaning that when Funk's Dam was removed in October 1992 the applicable definition of "discharge of dredged material" was the one found in the 1986 regulations. Alternatively, they argue that any subsequent discharge connected to dam removal remains covered by the 1986 regulations under a grandfather provision in the

1993 rules. The provision in question, 33 C.F.R. § 323.2(d)(3)(iii) (1993), provides that if a § 404 permit was not required for a discharge of dredged material under the 1986 regulations, then any discharges associated with the same dredging activity will continue to not require a § 404 permit under the new regulations, subject to certain conditions. *See* 58 Fed. Reg. 45,036 (1993). In no event, however, was the grandfather period to extend beyond Aug. 25, 1996. 33 C.F.R. § 323.2(d)(3)(iii) (1993).

By my analysis, all of these arguments are unnecessary: § 404 permit authorization for the removal of Funk's Dam[19] or for any ongoing discharge associated with dam removal was not required under *either* the 1986 or 1993 definition of "discharge of dredged material." Because the plaintiff relies on the more inclusive 1993 Tulloch rule, however, I will analyze Froebel's claims under this standard, noting that my conclusions apply *a fortiori* to the earlier and now reinstated version of § 323.2(d).

b. Discharge of fill material

Before discussing the finer points of "dredged material," I note that § 404 permit requirements also attach to discharges of "fill material." 33 U.S.C. § 1344(a). The facts

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[19] I reach this holding because issue preclusion forecloses only litigation on the need for a § 402, or WPDES permit prior to dam removal. There was no specific determination in the state courts that § 404 permit authorization was not required for dam removal by the DNR; indeed, the parties did not mention dredging permit requirements in the prior proceedings.

of this case, however, do not support the plaintiff's assertion that fill material has been discharged. The definition of "fill material" has not changed since the 1986 regulations: "The term *fill material* means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] waterbody." 33 C.F.R. § 323.2(e). Reinforcing the conclusion that fill material must be *purposefully* discharged to trigger § 404 permit requirements, the regulations include the following examples of discharges of fill material:

> Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices . . .

33 C.F.R. § 323.2(f).

Froebel argues that since the only "purpose" served by the muck and silt bars formed downstream of Funk's Dam is to change the bottom elevation of the Oconomowoc River and North Lake, the redeposited sediment may be considered fill material under the above definition. The plaintiff maintains, in effect, that the defendants' intent should not bear on whether or not the transported sediment constitutes fill material. In fact, the regulations compel precisely this understanding of fill material – "any material *used* for the *primary purpose*" of changing bottom elevation. 33 C.F.R. § 323.2(e) (emphasis

added). I cannot stretch the meaning of this straightforward definition to include material not intentionally used for any purpose by defendants, or anyone for that matter. The sediment redeposited downstream by the removal of Funk's Dam is therefore not fill material within the meaning of the applicable regulations.

c. Discharge of dredged material

As previously noted, the Tulloch rule enlarged the scope of the term "discharge of dredged material." The Corps' definition of just "dredged material," however, did not change in 1993 and remains singularly unhelpful: "The term *dredged material* means material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c). According to Webster's Third New International Dictionary 791 (1986), to excavate means "to hollow out" or "to dig out and remove." Similarly, to dredge means "to catch, gather, or pull out with a dredge" or "to deepen with a dredging machine: excavate with a dredge." *Id.* at 688. Fundamentally, plaintiff's claim that § 404 permit requirements apply to this case fails because the ongoing sediment transfer through Funk's Dam does not involve material that has been actively "dredged" or "excavated," as these terms are commonly understood and, indeed, as they are defined by implication by the entire structure of the CWA's § 404 permit system. *See* 33 U.S.C. § 1344.

Section 1344 of the Act and Part 323 of the Code of Federal Regulations, which together establish a detailed framework for the § 404 permit system, are replete with

examples of dredging and fill-placing *activities*. The definition of "discharge of dredged material" is a good example: "any addition . . . which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 33 C.F.R. § 323.2(d)(2)(iii); *see also, e.g.,* 33 U.S.C. § 1344(f) (listing numerous specific activities – including farming, silviculture, ranching, maintenance of dikes, dams, irrigation ditches and roads – which are exempted from otherwise-expected permit requirements under the Act). The CWA's interaction with the Rivers and Harbors Act, 33 U.S.C. §§ 401-467, is also instructive. Where actual dredging or excavation is regulated under the Rivers and Harbors Act, *see* 33 U.S.C. § 403, the CWA regulates the discharges associated with dredging activity. *National Mining Ass'n* at *12. Accordingly, under § 1344 the Corps may issue permits to discharge dredged material "at specified disposal sites," suggesting again that the material itself is excavated and within the physical control of the permittee to dispose of in various ways. *See* 33 U.S.C. § 1344. The cases cited by plaintiff also uniformly support an understanding of dredged material as material removed from waterbeds and then redeposited by active dredging. *See Avoyelles,* 715 F.2d 897 (wetland landclearing and deforestation using bulldozers); *M.C.C. of Florida,* 772 F.2d 1501 (uprooting of sediment by tugboat propellers); *Rybachek,* 904 F.2d 1276 (placer mining).

The plaintiff asserts that the sediment "redeposit" into the downstream waters of the river and lake is "incidental" to the "activity" of dam removal and therefore falls within the broad definition of "discharge of dredged material" under the Tulloch rule. *See* 33 C.F.R.

§ 323.2(d)(2)(iii). But a close reading of this section confirms that the redeposit, though incidental, must still be a redeposit "of dredged material." *Id.* That is, material that *has been dredged*. I simply do not think the CWA or the regulations issued by the Corps encompass a situation like the one at hand. Here, silt and sediment – itself not actively dredged, excavated, or otherwise mechanically disturbed – is redeposited over time due to the natural movement of water through a "discharging" structure such as the partially removed dam.

Froebel argues creatively that the shoddy removal of the dam left behind an outlet or hole which, due to physical principles, creates a "scouring action" that essentially excavates or dredges up the sediment in the dam impoundment and funnels it downstream. *See* Pl.'s Br. in Opp'n to Mot. to Dismiss by Waukesha County at 14. The plaintiff's argument is tempting. Powerful, scouring currents of water are sometimes expressly used to excavate and dredge waterbeds. But as the Wisconsin defendants stress, Meyer and Sturtevant have taken no action with respect to Funk's Dam since its partial removal in 1992. Indeed, Waukesha County, although the current riparian owner and thus potentially strictly liable for unlawful discharges emanating from the dam, never took any action *whatsoever* in connection with the darn. Given the structure of the Act and the Corps' regulations – which everywhere appear to contemplate the discharge of dredged material as a roughly immediate consequence of some activity consciously performed by the permittee – I cannot find that the gradual scouring occurring here, long after any activity by defendants, is producing and discharging "dredged material" within the meaning of

the Act's § 404 permit system. The very novelty of plaintiff's interpretation underscores the unreasonableness of expecting defendants to have understood that they should secure permits to cover the continuous discharge of "dredged material," although they were not actually dredging anything.

Because the ongoing sediment redeposit alleged by plaintiff does not involve material that has been actively dredged, there has been no "discharge of dredged . . . material" under 33 U.S.C. § 1344(a). Thus, a § 404 permit was not required in connection with Funk's Dam. In asserting defendants' failure to obtain such a permit, Froebel has failed to state a claim upon which relief can be granted under §§ 1311 and 1344 of the Act. Fed. R. Civ. P. 12(b)(6). Defendants' 12(b)(6) motions to dismiss Count II are therefore granted.

III. CONCLUSION

Six years after its partial and poorly implemented removal of Funk's Dam, the DNR has narrowly escaped accountability under the Act. While Froebel is finally in the right forum to pursue his claims for injunctive relief against the agency, unfortunately the Act, as currently drafted, appears to be the wrong statute to address the potentially severe consequences of improper dam removal on sediment distribution in navigable waters. *See* Michael T. Pyle, *Beyond Fish Ladders: Dam Removal as a Strategy for Restoring America's Rivers*, 14 Stan. Envtl. L.J. 97, 107-17 (1995) (discussing the engineering problems and ecological costs of dam removal). To the extent that an environmental policy favoring dam removal gathers

legitimacy and momentum, *see, e.g.*, Timothy Egan, *Heralding a New Era, Babbitt Chips Away at Harmful River Dams*, N.Y. Times, July 15, 1998, and state and federal agencies play a more active role in not only regulating dam removal but actually undertaking the removal of dams, circumstances provoking citizen suits like the plaintiff's will become more common. In light of this, statutory protection addressing this emerging environmental dilemma may be warranted.

For the foregoing reasons, all defendants' motions to dismiss are **HEREBY GRANTED**, and the clerk shall enter judgment accordingly.

SO ORDERED at Milwaukee, Wisconsin, this 30 day of July, 1998.

/s/ Lynn Adelman
LYNN ADELMAN
District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

KURT F. FROEBEL,

Plaintiff,

v.

GEORGE E. MEYER, et al.,

Defendants.

Case No. 97-C-654

(Filed Oct. 23, 1998)

DECISION AND ORDER

In a lengthy decision issued July 30, 1998, I dismissed both counts of plaintiff Kurt Froebel's citizen suit action under the Clean Water Act for failure to state a claim upon which relief can be granted. On August 10, 1998, Froebel filed a motion to reconsider that decision, pursuant to Fed. R. Civ. P. 59(e). That motion is now fully briefed.

I. STANDARD OF REVIEW

A motion for reconsideration serves two very limited purposes in federal civil litigation: to allow courts to correct manifest errors of law or fact and to address newly discovered evidence. *See, e.g., In re Prince*, 85 F.3d 314, 324 (7th Cir. 1996); *Moro v. Shell Co.*, 91 F.3d 872, 876 (7th Cir. 1996); *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995). Accordingly, Rule 59(e) motions are not vehicles to introduce new evidence or advance arguments that could and should have been

presented to the district court prior to judgment. *Moro* at 876; *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987).

II. ANALYSIS

Plaintiff argues that the court misapprehended the facts with respect to sediment discharge. To correct this asserted misapprehension, plaintiff submits an affidavit, curriculum vitae, and ten-page report by Professor Jerry Kaster, who studied and evaluated sediment discharge in the Oconomoc [sic] River and North Lake. Plaintiff also cites *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996), a case not previously mentioned in the parties' briefs. Next, plaintiff asserts that the court improperly construed the definition of "fill material" by placing undue importance on defendants' intent. Finally, plaintiff argues that the Kaster Report demonstrates that "dredged material," as the court understands it, was discharged at dam removal and continues to remain downstream in violation of the CWA. For the reasons stated below, I do not believe plaintiff has produced "newly discovered evidence;" nor has plaintiff identified "manifest errors of law or fact." *Rothwell Cotton* at 251. The motion for reconsideration will be denied.

A. Dismissal of Count I

Plaintiff contends that the court's discussion of whether the transfer of sediment into the lower Oconomowoc River constitutes an "addition" was premised on the faulty assumption that this sediment was specifically indigenous to the *river*. In fact, the Decision

clearly assumes at all points only that the sediment is indigenous to the *water*. For example: "The upstream silt and sediment now redeposited in the downstream waters of the river and lake were not 'introduced' into water from the 'outside world' by the operation or partial removal of the dam." Decision and Order at 48. The opinion indicates throughout that the court was aware that the sediment discharged downstream originated in the dam impoundment or in the upper reach of the Oconomowoc River, above the dam impoundment.

Plaintiff contends that the impoundment, the man-made reservoir behind the dam, should be distinguished from the river itself. An impoundment is "a body of water formed by impounding (as by a dam)." Webster's Third New International Dictionary 1136 (1986). In the Decision and now, I do not consider sediment originating in the impoundment as constituting an addition "into water from the outside world." See *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982). The Kaster Report merely restates, in highly technical language, that the sediment transported downstream came from the dam impoundment. This is not a new argument. As the court understands and accepts this contention, the Kaster materials present no "newly discovered evidence" on which to base a motion to reconsider.

Plaintiff also relies on *Dubois*, 102 F.3d 1273, for the proposition that the transfer of pollutants from one body of water to another body of water can constitute an addition in some circumstances. In fact, the court was aware of this case prior to issuing the Decision. I did not discuss *Dubois* in my opinion because the case was not cited by the parties, and its facts are distinguishable.

Nevertheless, the reasoning of the *Dubois* court actually supports my previous conclusions.

Dubois involved the disposal of water which had been pumped through a snowmaking system into Loon Pond in New Hampshire's White Mountain National Forest. *Id.* at 1277-78. The disposed water included water originally from Loon Pond, as well as water that originated downstream in the East Branch of the Pemigewasset River. *Id.* While water from the high altitude Loon Pond flows down the mountains and eventually empties into the East Branch, the reverse does not occur naturally. In the course of snowmaking operations for nearby ski resorts, East Branch water was mechanically drained, pumped, and disposed of upstream in Loon Pond. *Id.* at 1297-98. The disposed East Branch water contained polluting bacteria and organisms not previously present in Loon Pond. *Id.* at 1278.

Although the United States Forest Service argued that Loon Pond and the East Branch were still "hydrologically connected," the First Circuit held that there had been an "addition" of pollutants under 33 U.S.C. § 1362(12):

> [T]he Forest Service's "hydrological connectedness" proposal ignores a fundamental fact about water: the direction of flow. . . . [W]ater from the East Branch certainly does not flow *uphill* into Loon Pond, carrying with it the pollutants that have undisputedly accumulated in the East Branch water from some of the other sources of water entering the East Branch from upstream. Under such circumstances, defendants cannot credibly argue that these water bodies are so related that the transfer of water *from* the East

> Branch *to* Loon Pond is not an "addition" of water from one of the "waters of the United States" to another.

Dubois at 1298. The key factor foregrounded by the *Dubois* court is the direction of water flow, or the "naturalness" of the water transfer at issue. The snowmaking process involved actual removal and mechanical manipulation of polluted water, before its artificial disposal upstream. As the court described it, "the water leaves the domain of nature and is subject to private control rather than purely natural processes." *Id.* at 1297.

The facts of *Dubois* are clearly distinguishable from the facts of this case, in which dislodged sediment moves downstream along with the flow of water and without direct mechanical intervention. While the water flow through the breached dam is less than purely "natural," it is still a far cry from the active snowmaking and pumping process described in *Dubois*. Not only is the case distinguished on the facts, the reasoning of the *Dubois* court supports my belief, then and now, that the transfer of sediment *downstream* through Funk's Dam does not constitute an addition of pollutants within the meaning of the CWA. *Dubois*, therefore does not reveal a manifest error of law or fact for this court to correct.

B. Dismissal of Count II

Plaintiff argues that the court improperly interpreted the definition of "fill material" in 33 C.F.R. § 323.2(e) by placing undue importance on defendants' intent. The regulation unambiguously limits fill material to material used for the "primary purpose" of replacing water with

dry land or changing the bottom elevation of a body of water. 33 C.F.R. § 323.2(e). Plaintiff now argues that federal and state laws generally assume that actors intend the natural and probable consequences of their intentional acts and that therefore defendants' "primary purpose" is irrelevant, or may at least be inferred from the outcome.

The law of intent is more complicated than plaintiff suggest. More importantly, my reading of the definition of fill material is consistent with my understanding of the § 404 permit process, which presumes that the permittee is engaged in some conscious activity requiring the discharge of dredged or fill material. *See* Decision and Order at 58-59. Defining fill material as material deposited for a certain *purpose* – thus raising the question of defendants' intentional activity or lack thereof – is entirely consistent with this permitting scheme.[1] *Id.* at 56-57. When, as here, the plain meaning of the definition corresponds to the logic of the statute, it is unnecessary and unhelpful to explore and possibly import understandings of intent from other areas of jurisprudence.

Finally, plaintiff claims that the Kaster Report shows that "dredged material," as the court understands it, was discharged at dam removal and continues to remain in

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[1] Although material *not* deposited for the primary purpose of changing bottom elevation or creating dry land is not fill material, it may very well be dredged material, or it may satisfy the elements of pollutant discharge under some other section of the CWA. So plaintiff's dire prediction that, based on my holding, defendants need only say "we didn't mean to raise the bottom of the lake" to escape liability is unwarranted.

the lower reaches of the Oconomowoc River. As previously noted, the Kaster Report does not substantially recharacterize the sediment movement at issue but merely provides more scientific detail. Nonetheless, based on this report – apparently completed on the same day I issued my decision in this case – plaintiff changes tacks slightly, now emphasizing the "catastrophic" redeposit that occurred at the time of dam removal rather than the continuing periodic redeposit through the breached dam. Plaintiff further asserts that if any of the original, catastrophically dislodged silt remains in downstream waters then that constitutes a continuing violation of the CWA.

Plaintiff's new theory – that defendants' ongoing violation consists of the continued presence in the lower reaches of the river of sediment redeposited by dam removal six years ago – still depends on a finding that the original transported sediment is "dredged material" within the meaning of the § 404 permit system and 33 C.F.R. § 323.2(c). Based on the analysis in my earlier decision, I still do not find that the downstream movement of even large amounts of sediment as an immediate consequence of dam removal is "dredged material" as contemplated by the applicable statutes and regulations. *See* Decision and Order at 57-59. In this regard, plaintiff offers little more than the conclusory assertion that catastrophic discharge is consistent with the court's definition of "dredged material." *See* Pl.'s Br. at 9. I disagree. In short, plaintiff has not demonstrated a manifest error of law or fact with respect to Count II.

III. CONCLUSION

As a general point, several of plaintiff's current legal arguments could have been included in earlier briefings and are not properly raised on a motion to reconsider. *Moro* at 876. Nevertheless, I have reviewed plaintiff's new filings. I have not found "newly discovered evidence" or "manifest errors of law or fact" that compel me to alter or amend my previous judgment. *Rothwell Cotton* at 251; Fed. R. Civ. P. 59(e).

Accordingly, **IT IS HEREBY ORDERED** that plaintiff's motion for reconsideration is **DENIED**.

Dated at Milwaukee, Wisconsin, this 23 day of October, 1998.

/s/ Lynn Adelman
LYNN ADELMAN
District Judge

COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-0844

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

KURT F. FROEBEL,

PETITIONER-APPELLANT,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

NETTESHEIM, J. The issue in this case is whether the Wisconsin Department of Natural Resources (DNR) may

be ordered to take specific remedial actions based on findings made in the context of an administrative hearing that the DNR's removal of an abandoned dam caused harm to the environment. The administrative law judge (ALJ) determined that he did not have the authority to compel the DNR to so act. The circuit court upheld this determination on judicial review, and the court additionally determined that it also did not have such authority. Kurt Froebel challenges this ruling on appeal. Because we conclude that Wisconsin law does not allow an administrative or judicial authority to issue a mandatory injunction against the DNR, we affirm the circuit court order rejecting Froebel's request for such relief.

Froebel additionally appeals the circuit court's affirmance of the ALJ's determinations that (1) the DNR did not violate the public trust when it caused the discharge of silt and sediment into the Oconomowoc River and North Lake, and (2) the DNR did not own and operate a point source of pollution within the meaning of § 283.31(1), STATS. We also reject Froebel's challenges to these rulings.

BACKGROUND

The facts concerning the DNR's actions in this case, although lengthy, are not in dispute. Our recitation of that history is taken in large part from the ALJ's findings which were confirmed by the circuit court.

This case involves the removal, or "drawdown," of Funk's Dam which is located approximately one mile upstream of North Lake on the Oconomowoc River in the Town of Merton in Waukesha County. The dam was built

in 1850 and was "washed out" in 1965. In 1971, the DNR notified the dam's owner that the dam was in poor condition and in need of repairs. After the owner refused to comply with the DNR's recommendations, the DNR declared the dam "unsafe and abandoned." When funds became available to the DNR for the removal of unsafe dams in 1992, the DNR commenced the removal process of Funk's Dam.

On August 17, 1992, the DNR began to dismantle the impoundment behind the dam in anticipation of the dam's removal. The following day, the DNR prepared a public notice requesting comments on its proposal to remove the dam and suggestions regarding its Environmental Assessment for the removal project. An informational meeting was held on September 9, 1992, and on September 17, 1992, the DNR issued its decision ordering that the dam be removed. During this process, the DNR gave assurances that its plan for removal of the dam would not cause harm to the environment. On October 2, 1992, the DNR began removing the dam.

On October 12, 1992, the North Lake Management District (District) filed a petition for a contested case hearing challenging the DNR's decisions to remove the dam and to not obtain an Environmental Impact Statement (EIS) regarding the project. The DNR granted the District's request for a contested case hearing as to the removal of the dam. However, the DNR denied the District's request for a contested case hearing on the need for an EIS. The division of hearings and appeals assigned an ALJ to preside over the matter. *See* § 227.43(1)(b), STATS.

The administrative proceedings were stayed pending a judicial resolution of whether the District had a right to a contested case hearing under § 227.42, STATS., regarding the EIS. In ***North Lake Management District v. DNR***, 182 Wis.2d 500, 513 N.W.2d 703 (Ct. App. 1994), this court held that "the District does not have the right to a contested case hearing so long as there was an opportunity for public participation and a reviewable record was assembled." *Id.* at 506, 513 N.W.2d at 705. Our decision did not address whether a contested case hearing was required as to the removal of the dam because the issue was not before us.

Following our decision, the administrative proceedings resumed and Froebel was permitted to intervene. Later, the District and the DNR entered into a Cooperative Agreement under which the District withdrew its request for a contested case hearing regarding the removal of the dam. That left Froebel and the DNR as the remaining litigants and the matter proceeded to a contested case hearing on the issue of the removal of the dam.

Following the hearing, the ALJ determined that "[t]here is no real factual question that Funk's dam was unsafe and was dangerous to life[,] health and property prior to removal by the Department. . . . A clear preponderance of the credible evidence supports a Finding that the Department's decision to remove the Funk's dam was reasonable given Department concerns about public safety and sediment transport." The ALJ then identified the central issue as "whether the [DNR]'s implementation of its decision to remove the Funk's dam was reasonable,

necessary and appropriate based upon information foreseeable to the DNR at the time of dam removal."

The information available to the DNR at the time of the dam removal consisted of studies performed by its employees. At some point in 1992, William Sturtevant, Assistant State Dam Safety Engineer, developed a drawdown plan for the impoundment behind the dam. The plan set forth the minimum requirements for the contractor undertaking the draining of the mill pond. The steps and procedures included, among other things, building sediment barriers prior to the initiation of a drawdown in order to control erosion and installing a combination of pumps and siphons along the embankment.

In addition to the Sturtevant study, the DNR had an earlier study performed by DNR employee Michael Bozek in 1986. Bozek conducted a mill pond sediment survey of the potential depth, distribution and transport of sediment then located upstream of the dam. Bozek's study made recommendations to reduce the mass of sediment transported downstream upon the dam's removal such as slow lowering of water levels and the construction of a sediment pit in front of the existing dam.

With respect to the DNR's compliance with these recommendations, the ALJ found that "[t]here is no question that some of the significant features of both the Bozek recommendations and of the Sturtevant drawdown plan were not followed during dam removal." In addition, the dam was only partially removed. Froebel argues that the failure to follow the plans and to undertake certain other sediment control measures led to massive sediment discharges that could have been prevented.

Froebel's expert, University of Wisconsin – Milwaukee Professor Jerry Kaster of the Great Lakes Studies and Biological Sciences Department, testified that the DNR's actions in removing the dam did not adequately provide for sediment control and were not consistent with the recommendations by its own personnel.

The ALJ determined that Froebel had established that the dam's removal had resulted in a considerable amount of sediment being discharged into the Oconomowoc River directly causing large new muck and silt bars. A 1995 draft study performed by R.A. Smith noted that there were noticeable sediment beds downstream of the STH 83 bridge and in the inlet to North Lake and that these deposits may have negative effects on the fishery of the river and lake as well as the water clarity of the lake. Kaster's study of the area before, during and after the drawdown confirmed that "a large volume of sediment was transported as a result of the dam removal and that hundreds of tons of excess sediment continue to be deposited in North Lake as a result of the partial dam removal."

Based on the evidence, the ALJ made the following findings:

> A preponderance of the credible evidence supports a finding that a large amount of sediment was discharged into the Oconomowoc River and into North Lake as a result of the partial removal of the Funk's dam. The record taken as a whole also establishes that these navigable waterways have been detrimentally impacted by the manner in which the partial dam removal was undertaken. It is difficult to sort out what

> portion of the increase of sediment transport is directly the result of the failure of the Department and its contractor to undertake the dam removal in a manner that better limited sediment transport. What is clear from the record is that the possibility of transport of a large amount of sediment was foreseeable to the Department. The DNR had sound reasons for removal of the dam; the Department properly planned for removal of the dam. However, as the dam was removed, the Department was too quick to throw out its drawdown and removal plans as being impossible to perform. While it is difficult to sort though [sic] the cause and effect of the Department's actions in this case, the evidence supports a finding that the failure to follow the recommended drawdown and removal plans was a cause of the release of a large volume of sediment into public waters.

In spite of its finding that the DNR's actions had caused, or at least significantly contributed to, environmental damage in the Oconomowoc River and North Lake, the ALJ determined that the statutes did not provide Froebel a remedy. The ALJ stated:

> This case has a unique and extensive procedural posture that raises serious issues as to the jurisdiction and authority of the ALJ. This case was not noticed as an enforcement action or as a hearing on the reasonableness or necessity for any remedial actions by the Department or its contractor. There is no specific statutory authority for the ALJ to Order remedial actions by the Department or its contractor in light of the Division's conclusion that the failure to follow the drawdown and removal plan contributed to the release of sediment into the waters of the state.

> Under these circumstances, the ALJ believes the best course is to remand the case back to the Department to take such actions as the DNR sees fit under the circumstances.

On March 22, 1996, Froebel filed a petition for judicial review of the ALJ's decision. Froebel argued that the ALJ had acted arbitrarily, capriciously and contrary to Wisconsin law in concluding (1) that the DNR did not own or operate a "point source" which discharged pollutants into the water, and (2) that the ALJ did not have the legal authority to require the DNR to remove the fill, sediment and silt which was discharged and placed on the bed of the Oconomowoc River and North Lake. Froebel argued that such authority existed under § 30.03(4)(a), STATS.

Besides challenging these rulings by the DNR, Froebel additionally requested that the court grant him relief pursuant to § 227.57(5) and (9), STATS., by enjoining the DNR to remove the fill, silt and sediment bars in the Oconomowoc River and North Lake. In response, the DNR filed a motion to dismiss Froebel's request for injunctive relief because such relief would be "unavailable within the context of a judicial review action and beyond the jurisdiction and authority of the court to grant in a ch. 227, STATS., judicial review."

On December 27, 1997, the circuit court issued a decision concluding that the court did not have the power in a special proceeding to enjoin the DNR as requested. The circuit court granted the DNR's motion to dismiss those portions of Froebel's petition which requested injunctive relief. The court additionally affirmed the ALJ's decision. Froebel appeals.

DISCUSSION

When an appeal is taken from a circuit court order affirming an agency decision, we review the decision of the agency, not the circuit court. *See* ***Barnes v. DNR***, 178 Wis.2d 290, 302, 506 N.W.2d 155, 160 (Ct. App. 1993), aff'd, 184 Wis.2d 645, 516 N.W.2d 730 (1994). "Although we do not defer to the opinion of the circuit court, that court's reasoning may assist us." ***Id.*** Review of an agency's decision is confined to the record. *See* § 227.57(1), STATS.

The Statutory Authority of the ALJ and the Circuit Court

The primary issue in this case is whether the DNR may be ordered, by either the ALJ or the circuit court, to take specific remedial actions based on findings made in the context of an administrative hearing under ch. 227, STATS. Because this issue turns upon the statutory authority of the ALJ and the circuit court, it presents a question of law which this court reviews de novo. *See* ***Loomis v. Wisconsin Personnel Comm'n***, 179 Wis.2d 25, 30, 505 N.W.2d 462, 464 (Ct. App. 1993).

As a threshold matter, we reject the DNR's argument that Froebel's claim was improperly before the ALJ because a dam removal decision is not subject to a contested case hearing. *See* § 31.253(3), STATS. Regardless of whether the DNR's argument on this point is correct, the fact is that *in this case the DNR granted Froebel's request for a contested case hearing on the question of the dam removal.* When granting Froebel's motion to intervene in the dam removal proceedings, the ALJ stated: "[I]t appears Mr. Froebel was exercising his Ch. 31 public trust rights in

attempting to intervene in the *contested* case proceedings." (Emphasis added.) The ALJ was never asked to substantively answer whether Froebel was entitled to a contested case hearing on this question. As a result, the ALJ identified the issue at the hearing as "whether the Department's implementation of its decision to remove Funk's dam was reasonable, necessary and appropriate." The DNR has waived this argument, and we do not address it further. *See* ***DOR v. Wisconsin Tel. Co.***, 72 Wis.2d 259, 267, 240 N.W.2d 411, 415 (1976).

We therefore turn to whether the ALJ correctly determined that it did not have the authority to grant the relief which Froebel sought in this case. In doing so, we bear in mind that the authority and powers of an administrative agency are statutorily created and defined solely by the legislature. *See* ***Jocz v. LIRC***, 196 Wis.2d 273, 291, 538 N.W.2d 588, 593 (Ct. App. 1995). If there is any reasonable doubt as to the existence of an implied power of an administrative agency, it should be resolved against the exercise of such authority. *See* ***id.*** at 292, 538 N.W.2d at 593.

Froebel first argues that the ALJ had the authority to order the DNR to undertake remedial actions under § 30.03(4), STATS. The ALJ determined that § 30.03(4) "does not provide authority for the ALJ to reach the issue of the proper remedies to restore the environment in light of the release of sediment." We agree with the ALJ's determination.

When the facts are undisputed, the construction of a statute presents an issue of law subject to our independent review under § 227.57(5), STATS. *See* ***Ellingsworth v.***

Swiggum, 195 Wis.2d 142, 147, 536 N.W.2d 112, 114 (Ct. App. 1995). The primary goal of statutory construction is to ascertain the legislature's intent, and the first step in the process is to look to the plain language of the statute. *See State v. Sostra*, 198 Wis.2d 409, 414, 542 N.W.2d 774, 776 (1996). Where the import of that language is clear and unambiguous, we simply apply the statute to the facts of the case. *See Cary v. City of Madison*, 203 Wis.2d 261, 264, 551 N.W.2d 596, 597 (Ct. App. 1996).

Section 30.03(4)(a), STATS., provides in relevant part:

> If the department learns of . . . a possible infringement of the public rights relating to navigable waters, and the department determines that the public interest may not be adequately served by the imposition of a penalty or forfeiture, the department may proceed as provided in this paragraph. . . . The department may order a hearing under ch. 227 concerning the possible . . . infringement, and may request the hearing examiner to issue an order directing the responsible parties to perform or refrain from performing acts in order to fully protect the interests of the public in the navigable waters. . . .

Froebel argues that this statute authorizes the ALJ, as the designee of the DNR, to take specific remedial actions with respect to Funk's Dam.[1] The plain language of the statute indicates otherwise.

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[1] Froebel cites to various sections of ch. 227, STATS., for his contention that the ALJ becomes the designee of the department. These provisions merely prescribe how hearings which the DNR is required to conduct are assigned to an ALJ. In that sense only is the ALJ a "designee" of the DNR, and these

Section 30.03(4)(a), STATS., clearly contemplates the DNR as the initiator of the proceedings. Likewise, it is the DNR which "may request the hearing examiner to issue an order." The DNR did not initiate a proceeding under this statute. Nor did the DNR ever request any ALJ to issue any order under this statute. Instead it was Froebel who requested the ALJ to order the DNR to take remedial action. We hold that § 30.03(4)(a) does not contemplate the scenario envisioned by Froebel in which the DNR would bring an enforcement action against itself.[2]

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provisions do not allow for an interpretation that the DNR can, in effect, bring an action against itself.

[2] We therefore reject Froebel's attempt to liken this case to those in which the ALJ, acting upon a request of the DNR, has ordered private parties to take remedial action. *See* ***Application of Aqua Sports, Inc., for a Permit to Construct, Operate and Maintain Four Piers on the Bed of Lake Delton, Village of Lake Delton, Sauk County, Wisconsin***, Case No. 3-SD-85-709, 1985 WL 21112 (Wis. Div. Hrg. App.) ("[T]he Department requested that the hearing serve as a hearing under sec.30.03, Stats., and that an order, if deemed proper under that section be issued subsequent to the hearing."); ***In the Matter of the Complaint of Anthony and Lucille Lemanski and John and Claudia Niemiec Regarding an Alleged Illegal Pier Owned and Maintained by John W. and Linda L. Meudt, et al.***, Case No. 3-SD-81-904, 1983 WL 17839 (Wis. Dept. Nat. Res.) ("The Division of Natural Resources Hearings has the authority pursuant to secs. 227.012 and 30.03(4)(a), Stats., to issue an order directing parties . . . to perform or refrain from performing such acts as may be necessary to fully protect and effectuate the interests of the public in those navigable waters."). In these instances, it was the DNR which sought remedial action against certain entities – not the other way around as in this case.

Moreover, the ALJ correctly noted that the "instant proceeding was not noticed as a sec. 30.03, Stats., enforcement proceeding." Such a proceeding is brought *after* the DNR determines that "the public interest may not be adequately served by the imposition of a penalty or forfeiture." *See* § 30.03(4)(a), STATS. Again, the plain language of the statute contemplates the DNR as the enforcer, not the object, of an enforcement action. Here, the DNR did not consider or request a penalty or forfeiture against itself. Instead, the hearing before the ALJ was noticed upon Froebel's request for a contested case hearing under ch. 227, STATS., not as an enforcement proceeding under § 30.03(4)(a). Contrary to Froebel's assertion, § 30.03(4)(a) does not authorize the ALJ to order the DNR to take specific remedial action.

Next, Froebel turns to the circuit court's powers in a ch. 227, STATS., review proceeding. Froebel argues that the "plain language of § 227.57, Stats., provides specific authority for the circuit court to order injunctive relief of the nature requested by Appellant in a § 227.52 proceeding." We are unpersuaded. Section 227.57(2) provides that the court should affirm the agency's decision "[u]nless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section. . . . " Here, however, the circuit court expressly stated that such grounds did not exist. Having upheld the ALJ's findings and conclusions, the court was not permitted to compel a particular action. *See* § 227.57(5).

On the same theme, Froebel contends that the circuit court should have granted relief pursuant to § 227.57(9), STATS. That section provides in part that "[t]he court's

decision shall provide whatever relief is appropriate irrespective of the original form of the petition." Again, however, Froebel's argument overlooks that the circuit court found that the ALJ had correctly interpreted the law and found no other grounds upon which to set aside or modify the agency decision. *See* § 227.57(5). Absent such a finding, we reject Froebel's contention that the circuit court should have ordered injunctive relief.

Froebel next argues that the DNR arbitrarily and capriciously exercised its discretion under § 31.187(1), STATS., when it implemented the removal of Funk's Dam in a manner inconsistent with the DNR's policy and prior practice. Froebel contends that such action provides the circuit court with separate grounds under § 227.57(8), STATS., for reversing or remanding the agency's decision. We are unpersuaded.

Section 227.57(8), STATS., provides:

> The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

Because the DNR did not adhere to the sediment transport and erosion control measures set forth in its recommendations and representations to the public, Froebel

argues that the circuit court was empowered to grant remedial relief under this statute.

Froebel's argument overlooks § 31.187, STATS., which affords the DNR broad discretion in dam removal. Although the DNR must hold hearings pursuant to § 31.253, STATS., prior to removing a dam, its ultimate decision to do so is subject only to a public informational hearing. As the circuit court observed, the staff-recommended procedures for the dam removal do not constitute department orders. Although the DNR offered only a limited explanation for its failure to follow all of the recommendations, it nevertheless possessed the statutory authority to remove the dam in "such manner as it deem[ed] fit." *See* § 31.187(1). Section 227.57(8), STATS., provides that "the court shall not substitute its judgment for that of the agency on an issue of discretion." The circuit court did not erroneously exercise its discretion by failing to act under § 227.57(8). Furthermore, this section allows only for the reversal or remand of the case to the agency and does not further Froebel's argument for injunctive relief.

Sections 31.185 and 31.187, STATS.

Next, Froebel challenges the ALJ's interpretation of §§ 31.187(1) and 31.185, STATS. Section 31.187(1) provides in relevant part:

> The department may remove or cause to be removed, *in such manner as it deems fit*, old and abandoned dams in streams in this state, upon giving 60 days' notice in writing to the owner

> thereof, if the owner can be found. [Emphasis added.][3]

Froebel contends that the ALJ erroneously concluded that § 31.187(1) does not impose a standard upon the DNR when it is conducting a dam removal. We disagree. Section 31.187(1) clearly allows the DNR to remove a dam, and to do so "in such manner as it deems fit." Although this is a standard which gives total discretion to the DNR, it is a standard nonetheless. Moreover, Froebel cites no authority for his proposition that a standard is required.

Froebel argues that "[i]nterpreting § 31.187(1), Stats., as giving the DNR unfettered discretion to effectuate the removal of abandoned dams and to dump hundreds of tons of sediment into a river and lake clearly violates the constitutionally derived public trust doctrine." *See* WIS. CONST. art. IX, § 1. Froebel posits that this court should instead construe § 31.187(1) "consistently with and in light of" § 31.185(5), STATS. However, we conclude that § 31.185(5) is not aimed at DNR action and thus creates a different procedure when a private party seeks to remove a dam.

Section 31.185, STATS., governs permits to abandon dams. Under subsec. (1), "[n]o owner of any dam may abandon or remove or alter the dam without first obtaining a permit from the department." Section 31.185(1). "As a prerequisite to the granting of a permit . . . the department may require the applicant to comply with such

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[3] The ALJ found that the DNR met all of the procedural requirements under § 31.187, STATS. Froebel does not dispute this finding.

conditions as it deems reasonably necessary in the particular case to preserve public rights in navigable waters, to promote safety, and to protect life, health and property." Section 31.185(5).

Froebel argues that the phrase employed in § 31.187(1), STATS., "in such manner as [the DNR] deems fit" should be interpreted as imposing an obligation upon the DNR to determine a "fit" manner of removing a dam that is consistent with the obligations the DNR imposes under § 31.185(5), STATS., in light of its public trust responsibilities. Here, as with his argument under § 30.03(4), STATS., which we have already discussed, Froebel again attempts to turn the statute into a sword against the DNR. However, it is evident that the legislature did not intend the permit procedures for dam removal as applied to private parties in § 31.185 to be imposed upon the DNR when it chooses to remove a dam under § 31.187. If the legislature had so intended, it would not have created two different statutes, using wholly different language and setting out wholly different procedures. We uphold the ALJ's constructions of §§ 31.185 and 31.187.

Froebel further suggests that the ALJ's construction of these statutes permitted a violation of public trust. We disagree. The ALJ expressly found that "[a] clear preponderance of the credible evidence supports a Finding that the Department's decision to remove the Funk's dam was reasonable given Department concerns about public safety and sediment transport." Moreover, even if the ALJ had found otherwise, the bottom line issue in this case is

whether the law of this state accords Froebel the injunctive relief which he sought. As our discussions have revealed, it does not.

Violation of § 283.31(1), STATS.

Next, Froebel contends that the "DNR's arbitrary and capricious exercise of discretion under § 31.187(1), STATS., also violated Wisconsin law as it caused the illegal, unpermitted discharge of pollutants from a point source." Froebel argues that the ALJ erroneously concluded that the DNR was not the owner or operator of a "point source" within the meaning of § 283.31(1), STATS.[4] Because we conclude that this dam removal project does not fall within the parameters of § 283.31(1), we reject Froebel's argument.

Section 283.31(1), STATS., governs water pollutant discharge, elimination systems and related permits. This section provides:

> **(1)** The discharge of any pollutant into any waters of the state or the disposal of sludge from a treatment work by any person is unlawful unless such discharge or disposal is done under a permit issued by the department under this section or s. 283.33. The department may by rule exempt certain classes or categories of vessels from this section. Except as provided in s. 283.33, the department may require only one

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[4] We note that when this case began § 283.31(1), STATS., was § 147.02(1), Stats, 1993-94. Because this change does not affect our analysis, we refer to the current version of the statute.

> permit for a publicly owned treatment or collection facility or system, regardless of the number of point sources from such facility or system.

Froebel contends that the DNR should have obtained a permit pursuant to this statute before it removed the dam and caused the discharge of sediment.

The ALJ rejected Froebel's argument, citing testimony from Sturtevant and one other individual that the DNR does not require a Wisconsin Pollution Discharge Elimination System (WPDES) permit for a dam removal in addition to the permits required under ch. 31, STATS. The ALJ found that "[t]he Department did not err in failing to require a permit in connection with dam removal." We agree.

Chapter 31, STATS., governs the regulation of dams and bridges which affect navigable waters. Section 31.185, STATS., contains provisions which specifically govern the requirements for obtaining a permit to remove, abandon or alter a dam. As discussed above, the DNR is not obliged to obtain a permit under § 31.185 but is permitted to remove the dam in such a manner as it deems fit. *See* § 31.187(1), STATS. Section 283.31(1), STATS., does not specifically govern dam removal or its potential consequences. Under the rules of statutory construction, where a general statute conflicts with a specific statute, the specific statute prevails. *See* ***Estate of Cavanaugh v. Andrade***, 191 Wis.2d 244, 262, 528 N.W.2d 492, 499 (Ct. App. 1995), *rev'd on other grounds*, 202 Wis.2d 290, 550 N.W.2d 103 (1996). Thus, § 31.185, specifically aimed at dam removal, prevails over the provisions of § 283.31(1).

We conclude that the DNR was not required to obtain a permit pursuant to § 283.31.[5]

The DNR's Role

Finally, Froebel maintains that the ALJ's and the circuit court's rulings "gave DNR preferential treatment over private party violators and allowed DNR to infringe upon the public rights and interest which the Legislature has charged DNR with protecting." Froebel misdirects his criticism. The ALJ's and the circuit court's authority is limited by statute. *See Jocz*, 196 Wis.2d at 291, 538 N.W.2d at 593. The statutes pertaining to the regulation of dams and bridges affecting navigable waters are premised upon the powers of the DNR to oversee their construction and maintenance. *See* § 31.02, STATS. However, the statutes do not provide for the regulation of the DNR itself in this role, nor do they provide a manner in which the DNR may be enjoined to take specific remedial action. The ALJ, the circuit court, and now this court cannot lawfully grant Froebel's request for relief because we are bound by the statutes.

We join in the ALJ's criticisms of the DNR's practices in this case. We would expect the DNR, as the protector of this state's natural resources and the chief enforcer of our laws protecting those assets, to abide by the rules which it imposes and enforces on others. We also would expect it to abide by the promises and representations it

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[5] Moreover, like some of his other arguments, Froebel's interpretation would require the DNR to obtain a permit from itself. We reject that construction of the statute.

makes to the public regarding its own activities. These expectations may perhaps explain why the legislature has not deemed it necessary to create laws which make the DNR subject to the requirements imposed on others. However, we cannot rewrite the existing laws to accommodate Froebel's legitimate complaints. His arguments and his criticisms are more properly directed to the legislature.

CONCLUSION

We conclude that the statutes afford neither the ALJ nor the circuit court the authority to grant specific injunctive relief when the DNR causes damage during a dam removal process under § 31.187, STATS. We further conclude that the ALJ properly determined that the DNR is subject to the dam removal procedures set forth specifically for that activity under § 31.187 and that the DNR need not obtain a permit under § 283.31(1), STATS. We affirm the circuit court order.

By the Court. – Order affirmed.

Recommended for publication in the official reports.

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Removal of the Funk's Dam Located on the Oconomowoc River, Waukesha County, Wisconsin	))))	Case No. 3-SE-92-322

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice hearing was held on March 6-8, 1995 at Milwaukee, Wisconsin and April 4, 1995 at Waukesha, Wisconsin before Jeffrey D. Boldt, Administrative Law Judge. At the request of the petitioner, a formal written transcript was prepared and made available to the parties in August of 1995. The parties submitted written briefs and the last brief was received on November 6, 1995.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

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FINDINGS OF FACT

1. Funk's Dam is located approximately one mile upstream of North Lake on the Oconomowoc River in the Town of Merton, in the N.E. quarter of the N.W. quarter of Section 15, Township 8 North, Range 18 East, Waukesha County. The Old Mill Dam was built around 1850 and rebuilt in 1890 and 1928. The dam was washed out in 1965 and in March of 1975. At the time relevant to decision of this case, in the summer of 1992, the dam consisted of three stop log section gates, each 3' wide and a 60' wide emergency spillway. The dam also involved a 350' long earthen embarkment.

2. The dam washed out in 1965. In 1971, the Department notified dam owner Mr. Gerald Quinn that the dam was in poor condition and recommended repairs that were necessary to properly maintain the dam. There was a subsequent dam failure on March 12, 1975. The Department of Natural Resources issued an order requiring Mr. Quinn to repair the dam on May 6, 1975. The Department attempted to hold Mr. Quinn accountable for dam repair and satisfying the DNR dam safety requirements. Quinn refused to comply with the Department's orders.

3. On November 17, 1982, the Department issued a Determination that the dam was unsafe and abandoned and a Notice of the Department's intent to remove the dam. Mr. Quinn challenged the Department's Determination. However, the challenge was ultimately dismissed by the Wisconsin Court of Appeals on May 28, 1985.

4. On August 17, 1992, the DNR began its drawdown of the impoundment behind Funk's Dam in anticipation of dam removal. On August 18, 1992, the

Department prepared a public notice requesting comments on its proposal to remove the Funk's Dam. The notice also sought public input on the Department of Natural Resources' Environmental Assessment (EA) for removal of the project.

5. On September 9, 1992, the DNR conducted a public informational hearing on the proposed removal of the dam and on the EA for the project. On October 2, 1992, the Department's contractor began removing Funk's Dam.

6. On October 12, 1992, the North Lake Management District filed a petition for a contested case hearing challenging the Department's decision to remove the dam. The contested case hearing was stayed pending judicial resolution of the issue of whether or not there was a right to a contested case hearing under sec. 277.42, Stats., on the EA conducted by the DNR on the dam removal decision. See: *North Lake Management District v. DNR*, 182 Wis. 2d 500 (Wis. Ct. App. 1994). The Wisconsin Court of Appeals held that there was no such right.

7. Petitioner Kurt Froebel submitted a Notice of Appearance, Notice of Motion and Motion to Intervene in this administrative review proceeding on December 19, 1994. On January 23, 1995, the Division granted Petitioner Froebel's motion to intervene and Petition Froebel submitted a Petition for a Contested Case Hearing on February 1, 1995.

8. At some point in 1986, Mike Bozek, of Water Resources, DNR Southeastern District conducted a mill pond sediment survey of the potential depth and distribution and transport of sediment then located upstream

of the Funk's Dam. The object of the study was an analysis attempting to predict the amount of sediment to be washed out of the impoundment should the dam be removed and identification of the fact that under a failure a larger amount could be removed. (Ex. 4) The Bozek study undertook a cross section or transection across the stream channel to identify soft, transportable sediments as well as compacted sediments. Bozek used a 1.5 inch diameter stick and poked the stick into the impoundment sediments in order to measure the amount of soft sediment potentially transportable. The pole method employed by Mr. Bozek was reasonable and appropriate under the circumstances. The methodology has been used by other experts in the field and is very similar to a technique used by the U.S. Army Corps of Engineers. (TR, pp. 676-677)

Bozek calculated a range of from 93 to 186 yards (80 percent water) to 23 to 46 yards (95 percent water) for the amount of sediment expected to be transported out of the channel and deposited downstream to the river and into North Lake. Bozek further estimated that 90 percent of the total potential sediment load was transported downstream when the dam failed in 1975.

The parties essentially agree that an error was made in Bozek's calculations. The 1994 R A Smith Study concluded that the Bozek study made an error in calculating the volume of transect 1 and that the correct range was "actually 610 to 1,220 cubic yards." The Bozek study underestimated the potential sediment available for transport upon removal of the dam and drawdown of the impoundment. However, the record is not clear as to how this underestimation affected the DNR drawdown/

removal plans. Plainly, the Bozek study contemplated a potentially large volume of soft sediment available for transport. Further, in the EA, the Department observed that "an increase in the sediment load to the lake is expected during drawdown." (Ex. 8)

9. In August, 1991 the State Legislature passed legislation which authorized annual appropriations for fiscal years 1991-92 and 1992-93 for the removal of abandoned dams in the state by the Department of Natural Resources. Once appropriated funds became available, the Department began the process to remove Funk's Dam. A drawdown plan for the impoundment behind the dam was developed by William Sturtevant, Assistant State Dam Safety Engineer. (Ex. 5)

10. There is no real factual question that Funk's dam was unsafe and was dangerous to life health and property prior to removal by the Department. The Department was very concerned about the potential of flooding resulting from dam failure. A 1982 U.S. Army Corps of Engineers study determined that the dam provided no meaningful flood control for North Lake. Removal of the dam was expected to improve storage capacity of the floodplain and increase flood control for North Lake. (TR, pp. 168, 233, Ex. 8) Sturtevant conducted a ten-year inspection in 1988 and found the dam to be in very poor condition. The Department also believed that removal of the dam would reduce sediment transport in the area by stabilizing bottom sediments in the mill pond. (Ex. 8) A clear preponderance of the credible evidence supports a Finding that the Department's decision to remove the Funk's dam was reasonable given

Department concerns about public safety and sediment transport.

11. The central issue in the case is whether the Department's implementations of its decision to remove the Funk's dam was reasonable, necessary and appropriate based upon information foreseeable to the DNR at the time of dam removal. The Bozek study made several recommendations to reduce the mass of sediment transported downstream: 1) Slowly lower water levels in the impoundment during dam removal. 2) Using a crane, dig a sedimentation pit in front of the present dam to act as in channel sediment pit. The crane can both be used to disassemble the dam and dredge the sedimentation pit as it fills during drawdown. Spoils should not be deposited in the wetlands adjacent to the channel. 3) Only one dam structure should be removed to concentrate flow through one stream channel and maximize depth there during low flows. 4) Mud flat areas should be seeded with a wildlife seed mixture to stabilize these areas. (Ex. 4, pp. 6-7)

12. At some unknown time in 1992, DNR Assistant Dam Safety Engineer William Sturtevant prepared a formal drawdown plan (Ex. 5) which set forth minimum requirements for the contractor undertaking draining of the mill pond. A summary of the features of the drawdown plan is as follows:

Steps and procedures for draining of the Funk's mill pond are:

A. Erosion control in the form of a sediment barriers/traps must be placed prior to the initiation of the drawdown. Barriers are

required to be installed both upstream and downstream of the dam.

B. Install combination of pump(s) and syphons along the embankment and start draining the pond.

C. Lift the top board of the gated section of the dam ½ of its vertical dimension.

D. As the pond is drained, rocks are to be removed from the breached section of the dam equal in elevation to the water level in the pond.

E. Allow the pond to drain until the water level has stabilized at an elevation even with the bottom of the raised board.

F. Continue to work at removing the rocks and concrete in the breached section of the dam as the water levels in the pond recede. The river will form a channel upstream of the breached section. Once use of the pumps and syphons becomes inefficient, remove the rocks and concrete in the breached section of the dam until the pond is completely drained.

G. Remove rock and concrete fill in the existing breach area so as to drain the remaining portion of the pond at a rate not to exceed 0.5 feet per day.

H. The breached section of the dam is to be opened up to a bottom dimension of no less than 45 feet with 3:1 (horizontal:vertical) side slopes.

I. The rock and concrete removed from the breach area shall be used along the side

slopes of the breach in order to reduce further erosion of the earthen embankment.

J. Sediment collected in the downstream sediment trap shall be left in place if outside the defined stream channel and removed by hand if deposited in the stream channel. (Ex. 5)

13. There is no question that some significant features of both the Bozek recommendations and of the Sturtevant drawdown plan were not followed during dam removal. No sediment pit or basin was created upstream of the dam as recommended by Bozek. No sediment trap or barrier was placed upstream of the dam as contemplated by the drawdown plan. Downstream sediment traps were not effective nor properly pumped by the contractor. No pumps and siphons were installed along the embankment prior to drainage. Nor was all of the dam removed. The Department argues that on-site conditions made it infeasible to follow all of the above recommendations and that there were legitimate reasons for the failure to follow the particulars of the drawdown and removal plans. The petitioner argues that failure to follow the plans and to undertake certain other sediment control measures led to massive sediment discharges that could have been prevented. Accordingly, the alleged defects must be considered separately and as a whole to properly determine the reasonableness of the Department's implementation of the dam removal.

14. UW-Milwaukee Professor Jerry Kaster of the Great Lake Studies and Biological Sciences Department, testified on behalf of the petitioner. Kaster testified that excess amounts of sediments transported were the result

of the department's failure to build a large sediment settling basin, preferably in front of the dam spillway. (TR, p. 591)

Kaster concluded as follows:

> . . . the fact is that neither of these settling basins were constructed as recommended by the DNR personnel. And that's where the trouble began. It is possible to retain sediment, but it has to be done in a proper way, and it just – I mean, when you walk on site and see what had been constructed to retain that sediment, the first thing anyone could do, including a lay person, is shake their head. Those sediment basins were simply too small. Id.

The DNR argues that it was impossible to build the upstream sediment basin because of engineering problems in creating a basin large enough to be effective. The Department argues further that efforts to create such a basin would have re-suspended virtually all of the sediment in the impoundment and released a much larger volume of sediment. However, it is not at all clear from the record why these conditions were not foreseeable to Department personnel. As early as 1986, as the EA notes, the Department estimated a cost of $2500.00 for construction of a sedimentation basin. (Ex. 8, p. 2) The Department was well aware of public concerns relating to the release of sediment at the time of dam removal. The record is replete with concerns on this exact issue expressed well prior to design of the drawdown plan. Further, prior to the implementation of dam removal, Sturtevant had been to the site at least five or six times. (TR, p. 31) Sturtevant was aware or should have been

aware of the soft sediment in the area, the lack of room for a large settling basin and the size of the impoundment. If the DNR was unable to oversee construction of such a settling basin in front of the spillway, Kaster opined, then the Department should have followed the recommendations described by former DNR water quality planner Neil O'Reilly. (TR, pp. 591, Ex. 43) O'Reilly prepared a Recommended Erosion Control Plan that included specific plans for the placement of a sedimentation basin in front of, that is upstream of, the Funk Road Bridge. O'Reilly recommended that such a basin could have been constructed by placing either a sandbag dike, or steel or wood sheet pile structure in front of three culverts in the area to create a controlled impounded area. (Id.) The record does not adequately explain why the measures recommended by Bozek and O'Reilly could not be implemented. (TR, pp. 700-701) Further, if larger sedimentation basins could not have been constructed, the Department should not have represented to the public that it would build them, nor that the DNR's efforts to collect sediment would be adequate to protect the navigable waters of the river and North Lake.

15. Other suggested erosion control features were not followed. The downstream sediment basins were too small to be effective. The drawdown plan called for pumping of downstream sediment traps. Sturtevant testified that the Department twice tried to pump the sediment traps but that these efforts were unsuccessful because the material was so fine it re-suspended itself before the suction hoses could become operative. (TR, p. 65) North Lake Management Commissioner Terry Prust testified that he had actually observed the Department's

contractor pumping sediment from silt traps back into the river. (TR, p. 451) When Prust asked them what they were doing, the contractor's excuse was that the DNR did not tell them what to do with it. In fairness to the Department, this was clearly not true, as the Department's bidding contract clearly specified areas to deposit this sediment. Prust concluded that the whole operation did not work as the DNR had hoped it would and that the drawdown was not undertaken professionally or well planned. (TR, p. 455)

16. Heavy rains occurred during the drawdown and removal efforts, causing the impoundment to fill several times. This required further drawdowns and discharged additional sediment into the river and lake. (TR, p. 300)

17. As noted, not all of the dam was removed as had been hoped. The Department's EA had warned against partial removal of the dam for the following reasons:

> Remove the existing concrete spillway and emergency spillway. This option would leave the placement of the earthen embankment. While eliminating some of the water quality problems the most significant drawback to this option would be the potential failure of the earthern embankment during high water.

The RA Smith 1995 draft study concluded that this prediction had essentially come true and that the streambank erosion near the dam needed to be stabilized after the partial dam removal. The RA Smith study suggested that streambanks would benefit from placement of rock riprap on the 100 feet of streambank on the east bank

downstream from the outlet. The study also recommended that the structural integrity of dam breach itself be stabilized. (Ex. 24, Chapter 4)

18. A considerable amount of sediment was discharged into the Oconomowoc River as a result of the removal of Funk's Dam. The petitioners established through photographs and testimony that large new muck and silt bars were formed after the dam abandonment. (TR, pp. 619-620; Exs. 32-35) Formation of these unstable mud flat areas were the direct result of the dam removal. The R.A. Smith sediment analysis concluded that the partial dam removal was "likely responsible" for the recent sediment deposits downstream in the Oconomowoc River and in North Lake. The report noted that there are noticeable sediment beds downstream of the STH 83 bridge and in the inlet to North lake; and these beds have possible negative effects on the fishery of the river and lake as well as the water clarity of the lake. (Ex. 25, Conclusions)

Further, the petitioners established that a large amount of silt not visible from the land surface was deposited into North Lake (TR, p. 573) and that such a volume of sediment would be damaging to organisms in the river and lake. (Kaster, TR, p. 594)

Kaster performed testing of sediment transport from the Funk's Dam mill pond to North Lake before during and after the drawdown and partial removal of the dam. All of these studies confirmed that a large volume of sediment was transported as a result of the dam removal and that hundreds of tons of excess sediment continue to

be deposited in North Lake as a result of the partial dam removal. (TR, pp. 584-585)

19. A preponderance of the credible evidence supports a finding that a large amount of sediment was discharged into the Oconomowoc river and into North Lake as a result of the partial removal of the Funk's dam. The record taken as a whole also establishes that these navigable waterways have been detrimentally impacted by the manner in which the partial dam removal was undertaken. It is difficult to sort out what portion of the increase of sediment transport is directly the result of the failure of the Department and its contractor to undertake the dam removal in a manner that better limited sediment transport. What is clear from the record is that the possibility of transport of a large amount of sediment was foreseeable to the Department. The DNR had sound reasons for removal of the dam; the Department properly planned for removal of the dam. However, as the dam was removed, the Department was too quick to throw out its drawdown and removal plans as being impossible to perform. While it is difficult to sort through the cause and effect of the Department's actions in this case, the evidence supports a finding that the failure to follow the recommended drawdown and removal plans was a cause of the release of a large volume of sediment into public waters.

20. This case has a unique and extensive procedural posture that raise serious issues as to the jurisdiction and authority of the ALJ. This case was not noticed as an enforcement action or as a hearing on the reasonableness or necessity for any remedial actions by the Department or its contractor. There is no specific statutory authority

for the ALJ to Order remedial actions by the Department or its contractor in light of the Division's conclusion that the failure to follow the drawdown and removal plan contributed to the release of sediment into the waters of the state. Under these circumstances, the ALJ believes the best course is to remand the case back to the Department to take such actions as the DNR sees fit under the circumstances.

21. The Department did not error [sic] in failing to require a Wisconsin Pollution Discharge Elimination System (WPDES) permit in connection with dam removal. Vollbrecht and Sturtevant testified that the Department does not require WPDES permits for dam removal in addition to permits under Chapter 31. Vollbrecht testified that such a WPDES permit would likely have had similar conditions as the Chapter 31 permits.

22. The restoration of the dam is not feasible and may result in the transport of significant amounts of sediment. At the hearing prior petitioner counsel Lonsdorf essentially waived the issue of reconstruction of the dam, stating that the petitioner had no interest in putting back the dam. Further, reconstruction of the dam to meet existing dam standards would cost several hundred thousands of dollars. There is nothing in the record that any party would be willing to assume ownership and maintenance of the dam in the event it was reconstructed. Taken as a whole, there is no evidence in the record which would justify the extreme step of reconstruction of the dam. Further, this issue is outside the scope of the review of the reasonableness of and necessity for the decision to remove Funk's dam.

DISCUSSION

Several years have passed since the removal of the Funk's Dam in the late summer of 1992. The contested case was continued for over two years, as North Lake Management District (NLMD) pursued the Environmental Assessment issues in the appellate courts. This decision, accordingly, will reflect a degree of hindsight not available to Department employees at the time of removal of the dam. The Department properly sought removal of an abandoned and unsafe dam. The DNR's efforts to plan for removal of the dam were reasonable. The actual removal was plagued by heavy rains, which played a big part in the release of far more sediment into the Oconomowoc river and North Lake than expected. Further, on site conditions made it difficult to follow the Department's plans, and the Department's contractor apparently employed individuals who did not understand the basic purpose of sediment traps. The result was release of a large amount of sediment into the river and lake. The parties both raise legal issues as to the jurisdiction of the ALJ to order the Department to take remedial measures nearly four years after the underlying events in this case.

The Department argues under *Village of Thiensville v. DNR*, 130 Wis. 2d 276, 386 N.W.2d 519 (Ct. App. 1986), that the Department's decision must be reviewed in terms of the data and information available to the Department at the time the decision to remove the dam was made. *Village of Thiensville*, was a WPDES case interpreting sec. 147.20(1)(b), Stats. The Court of Appeals held, first, that the hearing examiner properly refused to admit evidence or to allow any challenge to WPDES permit terms that

were not affected by the specific permit modification noticed by the Department. Other conditions of the permit, not modified by the DNR and not timely appealed by the petitioner were held to be outside the review under sec. 147.20, Stats. Id., p. 282. Secondly, the Court of Appeals held that sec. 147.20, Stats. required that the hearing examiner limit his review to events which had been considered by the DNR. Id., p. 283. *Village of Thiensville*, therefore, affords administrative agencies fundamental fairness in ensuring that review proceedings have finality and focus on the issues at hand or reasonably foreseeable to the Department. While *Village of Thiensville* is not a Chapter 30, Stats. case the ALJ believes these principles should be operative in most administrative review proceedings. The ALJ finds that the question of sediment loading into the river and lake are directly related to the reasonableness and necessity of the drawdown and removal efforts and that these issues were reasonably foreseeable to the Department. (See: Finding #14) The RA Smith studies are therefore considered only for the limited purpose of correcting and commenting upon information available or reasonably foreseeable to the Department.

The instant hearing was not noticed or contemplated as a hearing on the appropriateness of possible plans to remediate sediment loadings. The petitioner argues that the ALJ has authority to Order remedial measures by the Department pursuant to sec. 30.03(4)(a), Stats. It seem clear that this provision governs Chapter 31, Stats., proceedings as well as those specifically under Chapter 30, Stats. Sec. 30.03(2), Stats., states that the attorney general is authorized to bring proceedings to "abate any nuisance

committed under this chapter or Ch. 31." Sec. 30.03(4)(a), Stats., states in pertinent part:

> If the department learns of . . . a possible infringement of the public rights relating to navigable waters, and the department determines that the public interest may not be adequately served by the imposition of a penalty or forfeiture, the department may proceed as provided in this paragraph. . . . The department may order a hearing under ch. 227 concerning the possible . . . infringement, and may request the hearing examiner to issue an order directing the responsible parties to perform or refrain from performing acts in order to fully protect the interests of the public in the navigable waters. . . .

The petitioner argues that this section authorizes the ALJ to enter "whatever injunctive orders are necessary to effectuate the purposes of the statutes – in this case to order restoration of the environmental conditions of the former Funk's Dam impoundment, the Oconomowoc River and North Lake." (Petitioner's Brief, p. 30)

The ALJ believes the petitioner overstates the authority of the Division in this matter. On its face, sec. 30.03, Stats., requires "a hearing under ch. 227" specifically relating to a "possible infringement of the public rights relating to navigable waters." As DNR counsel notes, the instant proceeding was not noticed as a sec. 30.03, Stats., enforcement proceeding. Further, such a hearing is contemplated under the statutes only in instances were [sic] "the department determines that the public interest may not be adequately served by the imposition of a penalty or forfeiture." In this case, the Division lacks authority to

impose a forfeiture or penalty upon the Department. The record would not support entry of such a forfeiture or penalty in any event, as the department has not violated any prior condition or order justifying entry of such a forfeiture. Accordingly, sec. 30.03, Stats. does not provide authority for the ALJ to reach the issue of the proper remedies to restore the environment in light of the release of sediment.

The Petitioner also argues that sec. 31.185(5), Stats., provides a basis for legal authority for the Division to order that remedial actions be undertaken by the Department. However, this provision is inapplicable to the present situation. On its face, sec. 31.185(5), Stats., applies only in cases where DNR is issuing a permit to an applicant to abandon a dam. That statutory subsection provides:

> 31.185(5) As a prerequisite to the granting of a permit under this section, the department may require the applicant to comply with such conditions as it deems reasonably necessary in the particular case to preserve public rights in navigable waters, to promote safety, and to protect life, health and property.

It is evident that this statutory provision is inapplicable to the current proceedings since the DNR is not required to obtain a permit to abandon a dam, but is specifically authorized under sec. 31.187, Stats., to remove abandoned dams.

The ALJ concludes that the Division does not have authority to Order the Department to draw up a remedial plan to address the sediment loading in the Oconomowoc River and North Lake. Administrative agencies have only

such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. *American Brass Co. v. State Board of Health*, 243 Wis. 440, (1944).

The ALJ can find no express nor necessarily implied authority to order remedial actions by the DNR under this unique fact situation. Further, it would be fundamentally unfair to require specific remedial actions by the DNR when the Department has not had the opportunity to specifically address these issues at hearing. As a practical matter, on the basis of the limited and largely one-sided evidence presented at hearing, some remedial actions by the Department or its contractor would appear to be in order. The RA Smith 1995 draft study may well represent a basis for the restoration of the river and the stabilization of the area to prevent further sediment loading into these waters. However, it is not for the ALJ to determine that issue definitively in the context of the present proceeding.

The petitioner argues that the DNR did not allow sufficient opportunity for public comment prior to the decision to remove the dam. The public informational hearing in this case was held after the slow drawdown was begun. Clearly, the better practice would be to begin drawdown of an abandoned dam to be removed after holding the required public informational hearing. However, Department did comply with the procedural requirements by holding the September 9, 1992, public informational hearing prior to the actual removal of the dam. This is all that is required under sec. 31.253, Stats. Overall, this case and the participation of the petitioner,

who did not himself file a petition to review until after the withdrawal of the NLMD request for a hearing, speak volumes as to the Department's efforts to include the public in its Chapter 31, Stats. process.

Finally, the ALJ does not accept the proposition that the DNR needed to require a WPDES permit in connection with its dam removal efforts. Department witnesses testified that the conditions of such a permit would clearly overlap the requirements for dam removal. Accordingly, the petitioners arguments as to requirement of an additional WPDES permit are without merit.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority pursuant to Ch. 31 and sec. 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact to hear contested cases and issue certain statutorily defined necessary Orders in cases involving abandonment of dams on navigable waters.

2. Section 31.185(5) states that as a prerequisite to the granting of a permit to abandon a dam the Department may require the applicant to comply with such conditions as it deems reasonably necessary in the particular case to preserve public rights in navigable waters, to promote safety, and to protect life, health and property.

3. The DNR may remove or cause to be removed, in such manner as it deems fit, old and abandoned dams in this state, upon giving 60 days notice in writing to the owner thereof, if the owner can be found. Sec. 31.187(2). The Department met all procedural requirements, of this

section by issuing Notice of Intent to remove Funk's Dam on November 1, 1982, pursuant to then sec. 29.04, Stats.

4. Section 31.253, Stats. requires that the DNR hold a public informational hearing on the proposed removal of a dam when such a hearing is requested, as in the instant case, prior to seeking or causing the removal of the dam under Chapter 31, Stats. The DNR complied with this procedural requirement by conducting a public informational hearing on September 9, 1992 in the Town of Merton.

5. The DNR has authority, in the interest of public rights in navigable waters or to promote safety and protect life, health and property, to regulate and control the level and flow of water in all navigable waters pursuant to sec. 31.02(1), Stats. This section does not specifically authorize the Department to begin the drawdown process for dam removal without entry of a specific order by the DNR. No such order was entered in this matter.

6. Section 30.03(2), Stats., states that the attorney general is authorized to bring proceedings to "abate any nuisance committed under this chapter or Ch. 31." Section 30.03(4)(a), Stats., states in pertinent part:

> If the department learns of . . . a possible infringement of the public rights relating to navigable waters, and the department determines that the public interest may not be adequately served by the imposition of a penalty or forfeiture, the department may proceed as provided in this paragraph. . . . The department may order a hearing under Ch. 227 concerning the possible . . . infringement, and may request the hearing examiner to issue an order directing the

> responsible parties to perform or refrain from performing acts in order to fully protect the interests of the public in the navigable waters. . . .

The instant contested case hearing was not noticed as an enforcement proceeding under this subsection, nor would it have been appropriate to have done so. Section 30.03, Stats., does not provide legal authority for the Division to Order specific remedial actions in this matter.

7. Under *Village of Thiensville v. DNR*, 130 Wis. 2d 276, 386 N.W.2d 519 (Ct. App. 1986), the Department's decision must be reviewed in terms of the data and information available to the Department at the time the decision to remove the dam was made. The ALJ has relied upon the subsequent RA Smith studies for the limited purpose of correcting errors in earlier Department calculation of sediment loadings and commenting on information available to the DNR at the time of its decision to remove the dam.

8. The DNR in seeking removal of the Funk's Dam was not "the owner or operator of a point source discharging Pollutants into the waters of the state" within the meaning of sec. 147.025(1), Stats. No WPDES permit is necessary in connection with either removal of the dam or any continuing sediment transport emanating from the Funk's Dam.

ORDER

Wherefore IT IS HEREBY ORDERED, that this matter be REMANDED back to the Department of Natural

Resources for such actions as the agency in its discretion deems appropriate.

Dated at Madison, Wisconsin on February 21, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND
APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608)266-7709
FAX: (608)267-2744
By /s/ Jeffrey D. Boldt
JEFFREY D. BOLDT
ADMINISTRATIVE
LAW JUDGE

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 28, 2000

Before

Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

KURT F. FROEBEL,

Plaintiff-Appellant,

No. 98-3925 *v.*

GEORGE E. MEYER, WILLIAM D. STURTEVANT, WAUKESHA COUNTY, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin

No. 97 C 654

Lynn Adelman, *Judge.*

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed by counsel for the plaintiff-appellant on July 12, 2000, all members of the original panel voted to DENY the petition for rehearing. No judge in regular active service requested a vote on the petition for rehearing en banc.

Accordingly, the petition for rehearing is hereby, DENIED.

NOTICE OF INTENT TO COMMENCE ACTION PURSUANT TO 33 U.S.C. § 1365

TO: PARTIES ON ATTACHED LIST

PLEASE TAKE NOTICE that Kurt F. Froebel ("Petitioner" or "Froebel"), an individual residing at N73 W32660 Clearwater Court, Hartland, Wisconsin 53029, (414) 367-4252, by his attorneys, Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, (414) 276-0200, will commence a civil action in the United States District Court for the Eastern District of Wisconsin pursuant to § 505(a)(1) of the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. § 1365(a)(1), against the Wisconsin Department of Natural Resources ("WDNR" or "Department"); George E. Meyer in his capacity as Secretary of the Wisconsin Department of Natural Resources; William D. Sturtevant, in his capacity as Assistant Dam Safety Engineer for the Wisconsin Department of Natural Resources; and Waukesha County for violations of the Clean Water Act arising out of their ownership and operation of a facility known as the Funk's Dam and the Funk's Dam Impoundment.

The legal and factual basis for the alleged violations of the Clean Water Act are set forth below.

IDENTIFICATION OF PARTIES

1. Mr. Froebel is an individual residing at N73 W32660 Clearwater Court, Hartland, Wisconsin 53029. His residence abuts Little North Lake which is connected to Big North Lake. Mr. Froebel has resided at this location since 1980, and prior to that, resided across Little North

Lake at N7268 W322 Reddelin Road. He has used the North Lakes for recreational (fishing, hunting, swimming) purposes for forty (40) years. Mr. Froebel's interests, as a riparian property owner, in the use and enjoyment of the North Lakes, and in the protection of the North Lakes from infiltration and transport of sediment, pollutants, silt, and nutrients have been and will continue to be adversely affected as a result of the discharge and placement of pollutants and fill in the Oconomowoc River and North Lake by the persons identified in ¶¶ 2-4 below. Mr. Froebel is a citizen as defined by 33 U.S.C. § 1365(g).

2. The Wisconsin Department of Natural Resources ("WDNR" or "Department") is an administrative agency of the State of Wisconsin, created and existing pursuant to the authority granted by the Wisconsin Legislature under Chapters 30, 31 and 147 of the Wisconsin Statutes, with its principal place of business located at 101 South Webster Street, Madison, Wisconsin 53707. The WDNR is charged, among other things, with responsibility for administering dams and dam impoundments for the protection of public rights in navigable waters. The WDNR was responsible for administering the ownership interest of the State of Wisconsin in the Funk's Dam and Impoundment at the time of the dam removal, and the WDNR maintains a continuing ownership interest in the dam and impoundment pursuant to the Public Trust Doctrine.

3. George E. Meyer is the Secretary of the Wisconsin Department of Natural Resources, 101 South Webster Street, AD/5, Madison, Wisconsin 53707. Secretary Meyer

is charged with ultimate responsibility for the supervision and control of WDNR employees. Secretary Meyer has the ultimate authority and responsibility to ensure that WDNR's dam removal operations did not and do not cause the release of pollutants or the placement of fill into the Oconomowoc River and North Lake.

4. William D. Sturtevant is the Assistant Dam Safety Engineer for the Wisconsin Department of Natural Resources, 101 South Webster Street, WZ/6, Madison, Wisconsin 53707. Mr. Sturtevant is the WDNR employee who was personally responsible for operating the Funk's Dam and its appurtenances during the dam removal activities.

5. Waukesha County is a political subdivision of the State of Wisconsin, with its principal place of business located at 1320 Pewaukee Road, Waukesha, Wisconsin 53188. Waukesha County is the current owner of the Funk's Dam and Funk's Dam Impoundment.

BASIS FOR CLAIMS

1. The Findings of Fact in the Findings of Fact, Conclusions of Law and Order issued February 21, 1996, by Administrative Law Judge Jeffrey Boldt are attached hereto as Exhibit A and incorporated herein by reference [hereinafter *Decision and Order*].

2. At all times material hereto, the Funk's Dam and the Funk's Dam Impoundment have been, and continue to be, point sources of pollutants being discharged to the Oconomowoc River and North Lake, within the meaning of 40 C.F.R. § 122.2.

3. The Oconomowoc River and North Lake are navigable waters of the United States, within the meaning of 40 C.F.R. § 122.2.

4. It is unlawful for any person to discharge any pollutant or contaminant to waters of the United States unless that discharge is in compliance with the CWA, under 33 U.S.C. § 1311(a); 40 C.F.R. § 122.2.

5. It is unlawful for any person to place or cause placement of fill in navigable waters of the United States without a lawfully issued permit under 33 U.S.C. § 1344(f)(2).

6. WDNR is a "person" under 40 C.F.R. § 122.2.

7. George E. Meyer ("Meyer") is a "person" within the meaning of 40 C.F.R. § 122.2.

8. William D. Sturtevant ("Sturtevant") is a "person" within the meaning [sic] 40 C.F.R. § 122.2.

9. Waukesha County is a "person" within the meaning of 40 C.F.R. 122.2.

10. Rock, sand, sediment and silt are "pollutants" within the meaning of 40 C.F.R. § 122.2.

11. WDNR began operating the Funk's Dam and the Funk's Dam Impoundment in August 1992, when the Department began drawing down the Funk's Dam Impoundment and implementing a dam removal project.

12. Sturtevant was personally responsible for conducting the operations at the Funk's Dam and Impoundment. Meyer was ultimately responsible for supervising Sturtevant's actions. All of Sturtevant's and Meyer's

actions and conduct were within the scope of their employment responsibilities with the WDNR.

13. As a direct result of Sturtevant's, Meyer's, and the WDNR's acts and omissions, thousands of cubic yard [sic] of sediment were discharged, and continue to be discharged on an intermittent basis into the Oconomowoc River and North Lake. *Decision and Order* ¶ 18

14. The silt that has been and continues to be discharged to the Oconomowoc River and North Lake has formed silt bars in the Oconomowoc River and at the mouth of the Oconomowoc River in North Lake. The silt deposits have impaired the navigability of the waters, *Decision and Order* ¶ 19, and are damaging organisms in the Oconomowoc River and North Lake.

15. As a direct result of Sturtevant's, Meyer's, and the WDNR's acts and omissions, the Funk's Dam Impoundment has been greatly reduced in size, destroying wetlands, natural habitats for many species, and impairing the navigability of the Impoundment.

16. Hundreds of tons of excess sediment continue to be deposited in North Lake as a result of the acts and omissions of Sturtevant, Meyer, and the WDNR and the failure of the current owner, Waukesha County, to take action to prevent the ongoing intermittent discharges.

17. At no time has Sturtevant, Meyer, the WDNR or Waukesha County ever applied for or obtained an NPDES permit pursuant to the Act, 33 U.S.C. § 1342(a) and 40 C.F.R. § 122.1(b).

18. At no time has Sturtevant, Meyer, the WDNR or Waukesha County ever applied for or obtained a permit

to place dredged or fill material on the bed or banks of the Oconomowoc River or North Lake as required by 33 U.S.C. § 1344(a) and (f)(2), and 33 C.F.R. § 323.3(a).

19. The discharge and placement of fill and silt in the Oconomowoc River and North Lake without a permit constitutes a continuing violation of the Clean Water Act. *Sasser v. Administrator,* 990 F.2d 127, 129 (4th Cir. 1993); *accord United States v. Reaves,* Case No. 94-925-Civ-J-20 (M.D. Fla. Feb. 22, 1996).

20. Upon information and belief, the intermittent discharge of additional tons of sediment, from the Funk's Dam and the Funk's Dam Impoundment to the Oconomowoc River and North Lake, will continue until Meyer, Sturtevant, and the WDNR and Waukesha County are enjoined to remedy their past violations and enjoined from allowing future violation of the Act.

CONCLUSION

As a direct and proximate result of Waukesha County's ownership and the operation of the Funk's Dam and the Funk's Dam Impoundment by Sturtevant, Meyer and the WDNR, each of them is jointly and severally responsible for ongoing violations of the Act due to the intermittent, continuing discharge of silt and sediment to the Oconomowoc River and North Lake and the placement of thousands of cubic yards of silt on the beds of the Oconomowoc River and North Lake.

This notice is being provided to you pursuant to the provisions of 33 U.S.C. § 1365. If you have any questions

or seek further information, you may contact the undersigned attorneys for Kurt F. Froebel.

Dated at Milwaukee, Wisconsin, this 8th day of May, 1996.

DAVIS & KUELTHAU, S.C.

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